Supreme Court, U.S.
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No. _____

# In The
# Supreme Court of the United States

MARIA CANO, ET AL.,

*Appellants,*

v.

GRAY DAVIS, ET AL.,

*Appellees.*

**On Appeal From The United States District Court For The Central District Of California**

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

IS INTENTIONAL RACE-BASED VOTE DILUTION PROPERLY EXCUSED BECAUSE THE DILUTED GROUP HAS ACHIEVED SOME ELECTORAL SUCCESS IN THE STATE, IN PART AS THE RESULT OF CROSS-OVER VOTING?

DOES RACIAL CLASSIFICATION OF VOTERS VIOLATE THE CONSTITUTION WHERE DEFENDANTS USE THE CLASSIFICATION TO "CRACK" A RACIAL GROUP RATHER THAN TO "PACK" IT?

## PARTIES TO THE PROCEEDING

Maria Cano, Paula Rangel, Maria Calleros, Norma E. Ramirez, Margo Muñoz, Myron Garcia, Frank Diaz, Consuelo E. Rodriguez, Jose Ruelas, Racquel Torres, Luis Natividad, Marisol Natividad, Luis Garcia, Luz Palomino, Silvia Palomino, Ignacio Leon, Joaquin Galan, Ernesto Bustillos, Cathy Espitia, Jose A. Hernandez, Wendy Estevez, Imelda LaVoie, Southwest Voter Registration and Education Project, Mexican American Political Association – San Fernando Valley Chapter, Mexican American Political Association – Imperial Valley Chapter, California League of United Latin American Citizens, League of United Latin American Citizens – District 17, League of United Latin American Citizens – San Fernando Valley Council 3019 were plaintiffs in the District Court and are appellants in this Court. Governor Gray Davis, and various other California state officials, listed below, were defendants or defendants-intervenors in the District Court and are appellees in this Court. A complete list of parties to the proceeding follows:

Plaintiffs - Appellants:

1. Maria Cano
2. Paula Rangel
3. Maria Calleros
4. Norma E. Ramirez
5. Margo Muñoz
6. Myron Garcia
7. Frank Diaz
8. Consuelo E. Rodriguez
9. Jose Ruelas
10. Racquel Torres
11. Luis Natividad

**PARTIES TO THE PROCEEDING** – Continued

12. Marisol Natividad
13. Luis Garcia
14. Luz Palomino
15. Silvia Palomino
16. Ignacio Leon
17. Joaquin Galan
18. Ernesto Bustillos
19. Cathy Espitia
20. Jose A. Hernandez
21. Wendy Estevez
22. Imelda LaVoie
23. Southwest Voter Registration and Education Project
24. Mexican American Political Association – San Fernando Valley Chapter
25. Mexican American Political Association – Imperial Valley Chapter
26. California League of United Latin American Citizens
27. League of United Latin American Citizens – District 17
28. League of United Latin American Citizens – San Fernando Valley Council 3019

Plaintiffs:

1. Bennie G. Corona
2. Enrique F. Aranda
3. Josephine Santiago
4. Antonio M. Lopez
5. Jose R. Pacheco
6. Christian Maldonado

Defendants and Defendants-Intervenors:

1. Governor Gray Davis
2. California Republican Party
3. Howard McKeon
4. Shawn Steel
5. Michelle Steel

**PARTIES TO THE PROCEEDING** – Continued

6. Michelle Bellis
7. Carolyn Jarnagin
8. Betty Cordova
9. Beckee Handrich-Seaman
10. Jill Schugardt
11. Tiffany Gharagozlou
12. Lieutenant Governor Cruz Bustamante
13. Secretary of State Bill Jones
14. John Burton as President *Pro Temporare* of the California State Senate and Intervenor California State Senate
15. Herb Wesson, Jr., in his official capacity as Speaker of the California State Assembly
16. James L. Brulte, in his official capacity as a Member of the California State Senate
17. Dick Ackerman, in his official capacity as a Member of the California State Senate
18. Bob Margett, in his official capacity as a Member of the California State Senate
19. California State Senate Republican Caucus
20. Kandiah Perinpanathan
21. Ed Savage
22. Denise Paul Perez
23. Michael Grobstein
24. Gary Chiate
25. Andy Mazor
26. Lee Frank
27. Sid Gold
28. Ed Kaz
29. Jon Lauritzen
30. Asta Criss
31. Randy Cohen
32. Gerald Fink
33. Michael Feinstein
34. Thomas Kaptain

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## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1253 to review the three-judge district court's entry of summary judgment – and concomitant denial of injunctive relief. Plaintiffs-appellants timely filed a notice of appeal on August 12, 2002. *See* 28 U.S.C. § 2101(b); Jurisdictional Statement Appendix ("J.S. App.") at 103.

## OPINION AND ORDER BELOW

The three-judge district court's "Opinion and Order Granting Defendants' Motions for Summary Judgment" is reported at *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002), and is reprinted in full in the Appendix. *See* J.S. App. at 1.

## RELEVANT STATUTES

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and section 1 of the Fourteenth Amendment are reproduced at J.S. App. at 106-07.

## STATEMENT OF THE CASE

### Factual Background

Following the March 2001 release of California-specific data from the 2000 Census, the governor and state legislature faced the decennial requirement of redrawing legislative districts to account for differences in population from 1990 to 2000. This included drawing 53 congressional

districts, one more than in 1991, as a result of California's population growth as compared to other states. The State Senate took primary responsibility for initially drawing the congressional districts. Ultimately, the congressional maps that the Senate consultant produced bore severe flaws in how they dealt with the burgeoning Latino community, which has grown to comprise nearly a third of the state's population.

The maps brought criticism from many members of the Latino community, in particular with respect to congressional districts in the San Fernando Valley and in San Diego County. When confronted about the congressional districts, the map-drawing consultants[1] – agents of the State Senate – made it clear that their overarching reason for drawing the criticized districts as they had was to limit the size and strength of the Latino community within each district because of a fear that a strong and cohesive Latino vote would pose a threat, in primary elections, to incumbent Congress members. Consistent with this continuing and intentional imperative, the map-drawers declined to accept any compromise that would increase Latino voting strength in any of the involved districts above "acceptable" levels – ceilings that would ensure insufficient Latino political power to threaten an incumbent. Therefore, the congressional map that the State Legislature and governor adopted intentionally severed – or "cracked" in traditional redistricting parlance – contiguous Latino neighborhoods

[1] The main map-drawing consultant was Michael Berman, brother of Rep. Howard Berman, incumbent in one of the districts intentionally gerrymandered to limit Latino electoral power.

that had been joined in single congressional districts throughout the preceding decade.

Thus, in the San Fernando Valley area of Los Angeles, the state of California adopted a map that splits heavily Latino neighborhoods – areas that had been together, as befits their undisputed community of interest, throughout the 1990s as a part of old Congressional District (CD) 26 – between new CD 28 and new CD 27. Portions of the communities of Mission Hills, San Fernando, Sun Valley, Sylmar, and Van Nuys, previously linked to North Hollywood, Pacoima, Panorama City, and other portions of San Fernando, Sun Valley, Sylmar, and Van Nuys inside of old CD 26, are now placed in new CD 27, with a different incumbent, Brad Sherman, while the latter set of communities remained in new CD 28 with incumbent Howard Berman from old CD 26. In order to achieve a map of two districts, neither of whose incumbent Congress members would be threatened by an effective majority of Latino voters, the map-drawers had to split the connected core of Latino neighborhoods. They did so by crafting a horseshoe-shaped CD 27 that shaved off portions of that Latino core in the west, north, and east. *See* J.S. App. at 110. At the same time, new CD 28 took in the central part of that Latino core (the stake to CD 27's horseshoe, if you will), while also dipping the district down to the overwhelmingly white, non-Latino communities to the south, and there expanding the district to the east and west – all to pick up communities with lots of white voters in areas such as Encino, Sherman Oaks, and Universal City. The effect and intent of this horseshoe-and-stake map was to ensure that neither CD 28 nor CD 27 has a Latino population that would seriously threaten either incumbent in the Democratic primary.

In a similar fashion, the mappers constructed new CD 51 in San Diego County by lopping off significant portions of connected Latino communities on the northwest border of the district. *See* J.S. App. at 113. These communities – including Logan Heights, Golden Hill, Sherman Heights, Memorial, Grant Hill, Southcrest, and Stockton – had for ten years been connected to neighboring Latino communities as part of old CD 50. The incumbent in old CD 50, Bob Filner, now resides in the newly-numbered CD 51 – a district that overlaps most of his old district, with the major exception of the Latino communities described above. The intent behind lopping off and separating these historically and continuously connected Latino communities was to diminish the strength of the Latino vote in CD 51 as not to threaten the incumbent.

Ultimately, both houses of the California legislature adopted the newly-drawn congressional districts, including those described above, and the governor agreed to the redistricted lines on September 27, 2001.

**Procedural History**

Plaintiffs, Latino registered voters in California, filed this action in the Central District of California on October 1, 2001. Plaintiffs challenged the congressional districts described above as a violation of rights protected by the Voting Rights Act of 1965 ("VRA" or "Act"), 42 U.S.C. § 1973 *et seq.*, and by the Fourteenth and Fifteenth Amendments of the United States Constitution. Plaintiffs pursued claims of intentional discrimination, under the Act and Constitution; and of "effects" discrimination,

under section 2 of the Act.[2] A three-judge district court (Reinhardt, C.J.; Morrow and Snyder, D.J.J.) heard plaintiffs' challenge to the congressional districts. *See* 28 U.S.C. § 2284(a) (three-judge court required in constitutional challenge to redistricting). After rejecting motions to dismiss for failure to state a claim and to abstain, the panel permitted limited discovery to go forward – restricting plaintiffs' ability to obtain or use some intent evidence by shielding testimony and evidence under the "legislative privilege" doctrine.[3] After discovery, defendants moved for summary judgment on all claims, and the court granted these motions on June 24, 2002. *See* J.S. App. at 1.

Plaintiffs raised two different intent-based claims: 1) intentional dilution of the Latino vote in violation of the Voting Rights Act and Constitution; and 2) racial gerrymandering in violation of the Fourteenth Amendment. With respect to the first, the panel concluded that, while assuming "for summary judgment purposes, the truth of plaintiffs' intent evidence, and of their charge that the legislature sought to limit the number of Latino voters in

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[2] Plaintiffs also raised an "effects" challenge, under *Thornburg v. Gingles*, 478 U.S. 30 (1986), to California's failure to create an additional Latino-majority State Senate district in Southeast Los Angeles County. The State Senate district is not at issue in this appeal. Plaintiffs alleged only an intent claim against the San Diego congressional district, while they alleged both intent and "effects" claims against the San Fernando Valley congressional district.

[3] Although plaintiffs believe that the district court erred in restricting testimony and evidence as it did, the panel's erroneous "legislative privilege" orders, *see* J.S. App. at 85-90; 91-100, did not affect the outcome of the case because the district court concluded that, even with these restrictions, plaintiffs presented enough evidence of intentional discrimination to create a material dispute.

the two districts at issue," J.S. App. at 75, plaintiffs nonetheless could not prevail because they had not shown enough of a dilutive "effect." Specifically, the district court concluded that plaintiffs could not satisfy the third pre-condition of the test set forth for "effects" claims under section 2 of the VRA in *Thornburg v. Gingles*, 478 U.S. 30 (1986) – "that a minority group's preferences are regularly defeated by a non-minority bloc of voters." J.S. App. at 79. The district court concluded that some amount of white cross-over voting for Latino candidates had permitted Latino-preferred candidates to prevail in some elections where Latino voters were not the majority.[4] The panel further found that the Latino community had attained a significant amount of political power in California. In light of these two conclusions, the panel held that plaintiffs could not prevail even assuming that the state had acted intentionally to dilute the Latino vote in the challenged districts. *See id.*

With respect to the racial gerrymandering claim, the panel again assumed that plaintiffs could demonstrate racial intent in constructing the districts to limit Latino voting power. Nonetheless, the panel held that the racial gerrymandering doctrine developed in *Shaw v. Reno*, 509 U.S. 630 (1993), applies only in challenges to heavily race-segregated districts. *See* J.S. App. at 7. Because plaintiffs here challenged multi-racial districts and presented evidence that the state had, on the basis of race, split the Latino community *between* districts, the district court

[4] Because plaintiffs had also alleged an "effects" claim against the San Fernando Valley districts, the panel had addressed the *Gingles* test at some length.

determined that they could not invoke the *Shaw* doctrine. *See id.* at 7, 13. In redistricting parlance, the panel held that intentional racial gerrymandering is only unconstitutional when it occurs through "packing" a minority group and not through "cracking" the group.

## ARGUMENT – SUBSTANTIALITY OF QUESTIONS

This case presents one stark and simple question: does a minority group's political power at a particular point in time permit a state to intentionally discriminate against that minority group? Constrained by the law governing summary judgment and plaintiffs' substantial evidentiary showing to conclude that a trier of fact could find that California drew congressional districts in the San Fernando Valley and San Diego County with the specific intent of limiting the political power of Latinos a racially-defined community, the district court panel held that plaintiffs had not shown enough dilutive "effects" in light of Latino political power in California, power obtained in part through obtaining crossover votes from non-Latinos. Nothing in this Court's precedent or in the Voting Rights Act or in the Constitution remotely suggests that intentional racial discrimination becomes lawful and acceptable solely because a racial group attains significant political power – here substantially less than controlling political power.

Yet, the district court's decision reaches that very conclusion, holding that plaintiffs could not proceed to trial on any statutory or constitutional claim even assuming, as the court was required to do, that defendants drew districts with the specific intention of limiting the Latino

vote to a size that would not threaten incumbent lawmakers with the prospect of successful challenge in the Democratic primary. This decision sets a dangerous precedent for any minority group that has attained or will attain significant political power. In the process of gaining or adding to that power, such a group would now face the prospective barrier of intentional discrimination, which the group would be powerless to challenge in court, even as the group's increasing power itself makes it an ever more likely target of intentional efforts to dilute its voting power. This kind of intentionally discriminatory political headwind contradicts every constitutional value. This case – by enshrining just such a headwind – raises substantial issues requiring Supreme Court intervention.

## I. Defendants Purposefully Split Latino Communities With the Specific Intent of Limiting Latino Electoral Power.

Because of the well-established principle disfavoring entry of summary judgment where evidence of racial intent is present,[5] the panel correctly assumed that

[5] This Court has noted the general impropriety of summary judgment when a claim involves issues of racial intent. Beginning with its first expositions of racial intent as a requirement under the Equal Protection Clause, the Court has consistently described a fact-intensive consideration of all of the circumstantial and direct evidence. *See Village of Arlington Hts. v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); *see also Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981) (referring to "elusive factual question of intentional discrimination"). Fact-intensive consideration is not conducive to summary resolution.

(Continued on following page)

plaintiffs could establish at trial that defendants acted with the intent to limit Latino voting power. Indeed, under Fed. R. Civ. P. 56, the district court, in ruling on summary judgment, could neither disregard nor weigh the extensive evidence that plaintiffs offered to show that defendants purposefully split the Latino community in creating the challenged districts.

It is important to note that this was not evidence of mere race consciousness, but evidence that the map-drawers acted with the specific intent of limiting the electoral power of Latino voters. Plaintiffs presented extensive evidence to support a finding of intentional discrimination. First, they presented expert testimony from Cal Tech Professor J. Morgan Kousser, who has testified as an expert on the issue of intentional discrimination in the drawing of districts many times. Relying on his published ten "intent factors," Dr. Kousser concluded that "[t]he evidence arrayed under the ten rubrics makes a formidable case for racially-tinged intent in the drawing of the 28th and 51st districts." *See* J.S. App. 150-51, ¶ 45; *see also id.* at 135, 136-56, ¶¶ 19,21, 22-47c.

Other strong evidence came in the form of direct testimony from legislators. State Assembly member Juan

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More recently, the Court has held that, except where the evidence is particularly weak, taking from the trier of fact the determination whether to infer racial intent from circumstantial and other evidence is improper. *Compare Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) *with Hunt v. Cromartie* ("*Cromartie I*"), 526 U.S. 541 (1999).

Vargas, a member of the redistricting conference committee testified that he, and, in his opinion, the legislature as a whole, understood that splitting off the Latino neighborhoods to the northwest of CD 51 was to ensure that a threshold of Latino population was not crossed that would threaten the incumbent Filner.[6] *See* J.S. App. at 124, ¶ 12. Vargas also concluded that this imperative stemmed in part from the payment by Filner of a $20,000 retainer to the Senate's lead map-drawing consultant. *See id.* Thus, Vargas concluded that there was a purposeful excision of Latino neighborhoods from CD 51 on the basis of race. Vargas also opined, based on his membership on the redistricting conference committee, that purposeful discrimination lay behind the lowering of the Latino proportion of CD 28.

More direct evidence of discriminatory intent as to the San Fernando Valley district came from Senator Don Perata, chair of the Senate committee in charge of redistricting. Perata stated, on the legislative record, that the State Senate chose not "to waste Latino voting strength on Howard Berman" and instead to "mov[e] some of the Latino population to an adjacent district . . . to encourage Congressman Sherman, the incumbent, to take leadership on issues of concern to the Latino community." *See* J.S.

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[6] In fact, Vargas had been specifically told of the Latino-voter ceiling by the map-drawers, *see* J.S. App. at 166-67 (decl. for TRO app.), but this was among the testimony erroneously excluded by the panel under legislative privilege. *See* J.S. App. at 85-90.

App. at 173. However benevolent in motive this publicly-stated concern might be,[7] it directly announces a singular, race-based motivation for drawing the map to split the Latino community between the two congressional districts. This is the only public statement of legislative intent; even if it attempts to place a more friendly face on the cracking of the Latino community, it demonstrates racial intent.

Plaintiffs also presented evidence demonstrating a strong motive to split the Latino community. Over the course of the 1990s, each challenged district had become increasingly Latino in population make-up. Along with this demographic change, the incumbent in each district had faced a serious primary challenge from a Latino candidate in recent years. *See* J.S. App. at 138-39, ¶¶ 26-28. In 1996, Bob Filner, the incumbent in CD 50 (which would become CD 51 in the state 2001 district plan), faced a challenge from Juan Vargas; Filner prevailed in the "expensive and brutal" race with a narrow 54 percent to 46 percent margin. *See id.* at 138, ¶¶ 26-27. In 1998, Howard Berman, the incumbent in CD 26 (which would become CD 28) faced a challenge from Raul Godinez; although Berman prevailed with two-thirds of the vote, Godinez did better than expected against a popular, long-term incumbent. *See id.* at 138, ¶¶ 26, 28. Such unexpectedly strong

[7] This Court has long held that good intentions or benign motivation do not render intentional racial discrimination lawful. *See Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) (it is irrelevant "whether or not the reason for the racial classification is benign or the purpose remedial"); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228-29 (1995) (" 'good intentions' alone are not enough to sustain a supposedly 'benign' racial classification").

primary-election challenges would certainly concern an incumbent and his supporters. That the challenges emanated from the growing Latino community within their districts also strongly suggests why diluting the strength of the Latino vote in these districts would present itself as an attractive option for self-preservation.

In addition to all of this, plaintiffs presented evidence regarding the shape of the adopted districts, which, as explained above, differed from their 1990s predecessors in the excision of significant pockets of Latino population – and, with respect to CD 28, in the addition of heavily non-Latino areas to the district. *See* J.S. App. at 108. Plaintiffs also presented evidence regarding the sequence of proposals considered for the districts, the closed and secretive process followed by the State Senate in crafting the congressional map, and the lack of evidence supporting a partisan explanation for the shape of the districts. In sum, there was substantial direct and circumstantial evidence of intentional racial discrimination in the drawing of the challenged congressional districts. Therefore, in ruling on defendants' motion, the district court correctly assumed that defendants had intentionally diluted the Latino vote by separating portions of Latino communities that were previously united in one district.

## II. The Panel's Holding That Intentional Discrimination Is Immunized By Latino Political Power Is Unprecedented.

With respect to the vote dilution claims, the panel determined that, even assuming evidence of intentional dilution – as explained above, an assumption that the court had to make under summary judgment standards –

plaintiffs could not prevail because they could not satisfy the third *Gingles* precondition. No court, in any published opinion, has ever held that any of the *Gingles* preconditions – much less the third – apply to a case involving proof of *intentional* dilution. The panel acknowledged that there is no Supreme Court precedent on this particular question, but asserted, with little identified support, that failure to satisfy *Gingles* precondition three – or an unexplained standard "similar" to it – means that plaintiffs have failed to show that "the ability of a minority community to elect representatives of choice is adversely affected." J.S. App. at 80. In effect, then, the panel concluded that some amount of crossover voting by non-Latino voters to support Latino-supported candidates – an amount that allows those candidates sometimes to win and that allows the Latino community to gain significant political power – permits a state to dilute Latino voting power intentionally on the basis of race.[8] In so holding, the panel converted *Gingles*, a case previously universally believed to make vote dilution challenges easier, into an extraordinary license to discriminate intentionally – a permission not found anywhere else in this Court's jurisprudence on intentional racial discrimination.

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[8] In other words, the panel effectively held that legislators may discriminate intentionally so long as some voters are not so discriminatory as to refuse to vote for minority candidates. The holding seems then to suggest that legislators' racially discriminatory intent is not enough, but must be accompanied by evidence of voters' racially discriminatory intent. That is an impossible and unprecedented standard. *See Gingles*, 478 U.S. at 72-73 (rejecting argued requirement of discriminatory intent of voters as even more burdensome than pre-amendment intent test, which looked to intent of elected officials).

### A. The Panel's Ruling Misreads *Thornburg v. Gingles*.

This conversion of *Gingles* prong three into a barrier to plaintiffs who prove intent is wholly inconsistent with the case itself. *Gingles* interpreted the 1982 amendment of section 2 of the Voting Rights Act, which was "largely a response to this Court's plurality opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980), which had declared that . . . minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose." *Gingles*, 478 U.S. at 35. According to the Court, Congress adopted the amendment "to make clear that a violation could be proved by showing discriminatory effect alone," and *Gingles* interpreted the VRA consistent with the amendment. *Id.* The Court applied the new "effects" test to North Carolina multi-member districts, but the Court never stated or even suggested that *intent* alone, could not, as it had before the amendment, prove an independent violation of section 2. Yet, here the panel – by requiring that plaintiffs meet the "effects" test despite strong evidence of intentional discrimination – effectively concluded that the 1982 amendment and *Gingles* supplant rather than supplement the previous prospect of proving a violation by showing purposeful discrimination.

If, as the panel implicitly concludes, the *Gingles* Court intended to eliminate the ability to prove intentional discrimination as an independent violation of the VRA, it seems odd, if not inexplicable, that neither the Court nor the Senate Report on which it relied, ever mention evidence of intentional discrimination as a pertinent consideration in evaluating the "totality of the circumstances." While it is true that the list of Senate Report factors,

reiterated in *Gingles*, "is neither comprehensive nor exclusive," 478 U.S. at 45, evidence that the challenged legislative action was motivated by purposeful racial discrimination would seem an obvious candidate for inclusion given its singular importance in *Mobile v. Bolden*, the very decision the 1982 amendment sought to address. The only logical reason not to include such evidence among the identified Senate factors is that proof of intent all by itself continues, after *Gingles* as before it, to amount to a violation of the Voting Rights Act.

### B. The Requisite "Effect" for An Intentional Dilution Claim is Lessened.

This is not to suggest that plaintiffs who prove intent need show no "effect"; plainly, Article III mandates that federal courts not redress mere psychic injuries. However, the panel imposed a much heavier standard – a standard developed specifically for cases where intentional discrimination could not be proven. *Gingles* precondition three does not measure whether there is *any* effect on ability to elect. It is a higher standard, requiring that white bloc voting "in the absence of special circumstances" "usually" defeat the minority candidate of choice. *See Gingles*, 478 U.S. at 51. Logically, of course, map-drawers who intentionally dilute minority political power may have a much lower threshold; they need not rig the system so that whites "usually" or "regularly" outvote Latinos, but only so that whites outvote Latinos in certain specifically anticipated circumstances. Here, for example, the map-drawers' evident concern was to protect powerful long-term congressional incumbents in San Diego and the San Fernando Valley from primary challenge. This set of circumstances requires less of a dilution of the Latino vote

than might be required to ensure that whites outvote Latinos in the "usual" case of an election without a strong incumbent. Yet, the Latino vote is still diluted – the Latino community still feels an "effect" and harm from the discriminatory intent – even if crossover voting means that it might, under some circumstances, win a theoretical open contest in either district.

From a more practical perspective, the map-drawers set out to dilute the Latino vote in the districts in question because they, as experienced political operatives serving legislative leadership, believed that this dilution would have an actual "effect," at least in preserving the incumbents in the circumstances – a Democratic primary challenge by a strongly Latino-supported candidate – that they foresaw. Moreover, this "effect," which the wrongdoers anticipated in framing the district as they did, is logical and well-supported. For example, reducing the Latino proportion of voters in the San Fernando Valley district from 38.5 percent to 27.0 percent is highly likely to affect the Latino community's ability, in at least some elections, to elect candidates of choice. The district court panel itself acknowledged that "[i]t would undoubtedly be easier for Latinos to elect candidates of choice in the version of the district proffered by plaintiffs," J.S. App. at 80 – in other words, in a district not created with an intent to restrict the strength of the Latino community in mind. This "effect," while perhaps less than the "usual" defeat standard in *Gingles* precondition three, is nonetheless, a real effect. This effect suffices to warrant court protection against intentional discrimination.

### C. The Panel's Holding Is Inconsistent With So-Called "Reverse Discrimination" Decisions.

Supreme Court precedent, while absent on the specific issue here, nonetheless strongly suggests that the panel's application of the high *Gingles* threshold to an intent case was wrong. Indeed, it is impossible to square the panel's conclusion – that intentional vote dilution is no longer actionable once the plaintiffs' minority group has attained some level of political power – with *any* of this Court's so-called "reverse discrimination" jurisprudence. These challenges have been brought by non-Latino whites against government agencies where non-Latino whites exercised not only significant, but in most cases controlling, political power. Yet, in every case, this Court permitted the claims of intentional discrimination to go forward despite the political power held by the plaintiffs' racial group.[9] *See, e.g., Adarand Constructors*, 515 U.S. 200 (challenged program adopted by Congress, still majority white); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989) (set-aside adopted by Richmond city council, with substantial white minority); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (program adopted by University of California, still controlled by whites).

Among the more recent cases reiterating this Court's continued hostility toward intentional discrimination –

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[9] Because these "reverse discrimination" cases do not arise in the voting/political context, political power may not be the relevant analogy. Even so, whites plainly exercised substantial "economic" or "educational" power, the possibly more appropriate analogues, in the set-aside and university admission cases.

even when directed against members of well-empowered racial groups – are *Shaw v. Reno*, 509 U.S. 630 (1993) and the cases following it. Although this line of cases acknowledges that map-drawers may be aware of race in undertaking redistricting,[10] *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 916 (1995), these cases also implicitly reject a notion that a group's political power or ability to influence electoral outcome somehow renders intentional discrimination beyond legal attack.[11] These voting rights decisions present the quintessential case of intentional discrimination against a group that exercises substantial political power despite that discrimination. Thus, this Court's precedent in the "reverse discrimination" arena makes abundantly clear that the political power of a plaintiff's racial group cannot preclude an intentional discrimination claim.

### D. The Panel's Theory Contradicts the Long-standing Disfavor of Intentional Discrimination.

Apart from this more recent "reverse discrimination" law, the panel's theory directly contradicts this Court's

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[10] As explained above, the racial intent evidence here showed far more than mere race consciousness, but a deliberate intent to limit the voting power of Latinos as a racial group in the challenged districts.

[11] The *Shaw* cases differ from the "reverse discrimination" cases cited above in that the race of the plaintiffs is irrelevant in a *Shaw* claim. *See Shaw*, 509 U.S. at 641 (plaintiffs did not claim dilution of white vote or that they are white). Yet, this very inattention to the race of the plaintiff proves that the level of political power held by plaintiff's racial group is an irrelevant concern.

longstanding hostility toward intentional racial discrimination and, more specifically, its rejection of the "governing majority" theory 25 years ago. In *Castaneda v. Partida*, 430 U.S. 482, 499 (1977), the Supreme Court expressly rejected the "governing majority" theory adopted by the trial court; the Court held that the fact that Mexican Americans were a governing majority of the county could not preclude a claim of discrimination against Mexican Americans in the composition of grand juries. The Court declined to accept that "the many elective positions held by Mexican-Americans in the county" could bar a finding of jury exclusion, stating that "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *See id.* at 490, 499. Thus, even before the more recent "reverse discrimination" era, this Court has soundly rejected arguments that a minority group's achievement of political power, even controlling power, renders intentional discrimination against that group beyond challenge.

This Court has long identified race and ethnicity as suspect classifications and applied strict scrutiny to intentional discrimination on these bases precisely because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *see also Richmond*, 488 U.S. at 491 ("Framers . . . desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("[t]hese factors are so seldom relevant to the achievement of any

legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy"). Indeed, this Court has only upheld intentional racial discrimination under strict scrutiny once, based upon extreme wartime exigencies, in a decision now widely questioned and criticized. *See Korematsu v. United States*, 323 U.S. 214 (1944). Yet, despite this long history of intolerance for intentional racial discrimination, the panel effectively concluded that California gets a "free pass" to discriminate overtly merely because, largely due to political and legal pressure, it no longer completely freezes out Latinos from political power.

### E. The District Court's Decisions Cannot Be Squared With Recent Decisions Under the Voting Rights Act.

Finally, the panel's conclusion is hopelessly in tension with this Court's recent case law on section 2 of the Voting Rights Act. In *Johnson v. De Grandy*, 512 U.S. 997 (1994), which involved a non-intent "effects" claim, for example, the Court expressly rejected the proposition, urged by the state of Florida, that representation proportional to a minority group's population precludes a finding of vote dilution as a matter of law. *See* 512 U.S. at 1017-21. The Court rejected the request to identify proportionality as a "safe harbor" from Section 2 "effects" claims, in part because of the "demonstrated ingenuity of state and local governments in hobbling minority voting power." *See id.* at 1018 & n.15 (citing two articles by plaintiffs' expert J. Morgan Kousser). Therefore, the Court held that proportionality should be considered as a part of the "totality

of the circumstances" inquiry, but that it is not determinative. "[T]he degree of probative value assigned to proportionality may vary with other facts." *Id.* at 1020. Thus, while this Court has refused to recognize proportionality as a "safe harbor" from non-intentional, effects-based vote dilution, the panel here nonetheless concluded that some level of minority access to power – a level far short of proportionality – provides immunity from claims of *intentionally discriminatory* vote dilution. Yet, in *De Grandy*, this Court seems specifically to have anticipated intentional discrimination, and to have believed that the level of the targeted group's political power, even if proportional, should not excuse such intent. Thus, the Court illustrated the preposterousness of the "safe harbor" notion by noting that "[u]nder the State's view, the most blatant racial gerrymandering in half of a county's single-member districts would be irrelevant under § 2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line." *Id.* at 1019. Here, the district court granted the very "safe harbor" that this Court expressly rejected in *De Grandy*.

More recently, this Court's opinion in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), seems, by fair implication, to establish that the panel's conclusion that plaintiffs must show the "effects" of vote dilution under *Gingles*, even if a purpose of dilution is proven, is incorrect as a matter of statutory construction. As this Court pointed out in *Bossier Parish*, sections 2 and 5 of the VRA, and the Fifteenth Amendment, all use similar terminology in referring to "abridgement of the right . . . to vote." *See* 528 U.S. at 333-34; 42 U.S.C. § 1973(a). However, owing to "the differing contexts in which the term is used," abridgement of the right to vote has a somewhat different

meaning – "referring only to retrogression in § 5, but to discrimination more generally in § 2 and the Fifteenth Amendment." *Id.* at 334. This difference aside, *Bossier Parish* provides instructive guidance as to another important aspect of prohibitions on "abridgement." The decision recognizes that state legislative actions can have a *purpose* of abridgement and/or an *effect* of abridgement – in other words that purpose and effect of abridging the right to vote are analytically distinct. Indeed, this Court discussed briefly the different burdens of proving purpose versus effect, noting that sometimes purpose may be easier to prove than effect. *Id.* at 332. Unlike section 5 of the Voting Rights Act, section 2 does not refer expressly to "purpose" and "effect"; thus, the question is whether section 2 implicitly incorporates these two analytically distinct notions of abridgement conjunctively or disjunctively. Because it holds that an intent showing is not required, the *Gingles* decision already establishes that the two are not conjunctive in section 2. Accordingly, they must be disjunctive – either an effect of abridgement, determined through the *Gingles* test, or a purpose of abridgement are proscribed.

Here, the district court required the arduous *Gingles* showing even though it concluded that plaintiffs produced evidence that could prevail at trial in showing an intent to dilute the Latino vote. This was an unprecedented error, requiring this Court's revision. Under this Court's well-developed jurisprudence, if there is an injury sufficient to confer standing under Article III,[12] there is simply no "safe

[12] When intentional discrimination is at issue, the showing of effect or injury is not a high threshold. *See, e.g.*, *Northeastern Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993)

(Continued on following page)

harbor" where government can intentionally discriminate with impunity.

## III. The Panel's Conclusion That Challenges Under *Shaw v. Reno* Are Limited to Segregated Districts Misapplies the Constitution.

Having barred plaintiffs from pursuing, despite strong evidence of intentional race-based dilution, a vote dilution claim under either section 2 or the Constitution, the panel proceeded also to prevent plaintiffs from pursuing their alternative claim of racial gerrymandering. Such a claim, initially described in *Shaw v. Reno*, requires a more difficult showing of intent than an intentional vote dilution claim – plaintiffs must prove that "race was the predominant factor motivating the legislature's decision to

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(requisite injury is "denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit"). Here, it is enough that, as the panel held with respect to the San Fernando Valley district, "[i]t would undoubtedly be easier for Latinos to elect candidates of choice" absent the challenged discrimination. *See* J.S. App. at 80. Of course, a similar conclusion applies to the San Diego district – that the purposeful refusal to increase the Latino proportion of the district above a certain point makes it more difficult for Latino voters to elect a candidate of choice. With respect to the San Diego district, the panel also seemed to hold that plaintiffs lack the requisite injury (or fail to show enough of an "effect") because, even as drawn by the legislature, the challenged district is a heavily Latino district. *See* J.S. App. at 82-83. However, the panel's central conclusion in this regard – that injury or "effect" analysis requires attention to "the voting power of the group" such that individual voters' exclusion from a district is irrelevant, *see* J.S. App. at 83 – is hopelessly in tension with this Court's consistent reiteration that the right to be free of discrimination is an individual and not a group right. *See, e.g.*, *Adarand Constructors*, 515 U.S. at 227 (Equal Protection Clause protects "*persons* not *groups*").

place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. Here, as with the dilution claim, the district court "assum[ed] plaintiffs' allegations of racial intent to be true"; still, the panel held the *Shaw* doctrine wholly inapplicable as a matter of law because the challenged districts "cannot reasonably be understood to segregate voters into racial enclaves." J.S. App. at 13, 7. The panel's conclusion is wrong. Creation of "diverse and multi-ethnic" districts, J.S. App. at 13, does not sanction the intentional classification of voters on the basis of race.

### A. The Constitution Prohibits Any Predominantly Racial Classification of Voters, Not Just Segregative Classification.

The panel confused the symptom for the disease. The Constitution prohibits classification of voters on the basis of race. *See, e.g.*, *Cromartie I*, 526 U.S. at 546 ("all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect"). Segregated districts often evidence such an unlawful classification of voters, but segregation per se is not unconstitutional. It is the racial classification of voters that the Constitution abhors – placing "a significant number of voters within or without a particular district" predominantly on the basis of race. *Miller*, 515 U.S. at 916. That prohibited conduct can occur in the creation of "multiethnic" districts as well.

Indeed, "impermissible racial stereotypes," one of the critical harms identified in *Shaw*, apply whether a state chooses to "crack" or to "pack" a community on the basis of race. 509 U.S. at 647. Here, for example, the map-drawers assumed that Latinos would vote cohesively, that they

would favor a Latino Democrat over an incumbent non-Latino Democrat regardless of how supportive that incumbent had been with respect to issues of concern to the Latino community, and that Latino voting strength therefore had to be limited to protect the incumbents. These are the very assumptions – "that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls" – that underlie the *Shaw* doctrine.[13] *See id.* Even though they did not create segregated districts, defendants classified voters based on race when they intentionally split the Latino community, which they viewed solely as a race-defined community. The panel's conclusion that a racial gerrymandering claim requires segregation grossly misreads precedent and the Constitution itself; the panel decision would improperly shield much constitutionally suspect racial classification of voters.

### B. The Panel Failed to Credit Appropriately Plaintiffs' Evidence of Racial Intent.

As an alternative basis for rejecting plaintiffs' *Shaw* claims, the panel concluded that, even though it had to assume for purposes of summary judgment that plaintiffs had proven their allegations of racial intent, plaintiffs

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[13] The other harm identified in *Shaw* – the "message . . . to elected representatives," *Shaw*, 509 U.S. at 648 – also applies in the intentional "cracking" context, albeit in a slightly different way. While here, elected representatives would not feel beholden to one racial group, they could hardly help but feel less of an obligation to serve any member of the Latino community because the perceived political threat from that community had been minimized or diluted through race-based redistricting.

failed to show that the state also ignored traditional redistricting principles. J.S. App. at 21. The district court then applied very basic criteria – such as city splits and the lack of a bizarre shape[14] – to conclude that the state complied with the Constitution. In other words, the district court effectively concluded that reducing city splits immunizes proven racial intent. This error, like the previous, slights the unconstitutional disease in favor of its symptom. Ignoring traditional redistricting criteria is of constitutional concern only because it evidences possible racial motivation, but racial motivation is constitutionally suspect even if it is accomplished without splitting cities or creating a bizarrely-shaped district.

The panel treated racial intent and abandonment of traditional criteria as separate requisite elements. *See* J.S. App. at 21 ("plaintiff must demonstrate *both* that the legislature was predominantly motivated by racial intent . . . *and* that it ignored traditional districting principles") (emphasis added). In contrast, this Court has characterized the latter as simply a mechanism of demonstrating the former. *See, e.g.*, *Cromartie I*, 526 U.S. at 546-47. Stated differently, proof of racial intent necessarily demonstrates a failure to follow traditional redistricting criteria precisely because racial intent is not one of those traditional criteria. Thus, when the panel assumed –

[14] The district court applied a test of unusual shape that is exceedingly generous, ignoring significant shape changes that imply racial intent. Thus, it held CD 28 not to be unusually shaped, even though the state took two neighboring circular, oblong districts from the 1990s and converted them into the odd horseshoe-and-stake configuration described above. *See* J.S. App. at 115.

correctly, under the standards governing summary judgment[15] – that plaintiffs had proven that defendants intentionally split the Latino community as a racially-defined group in drawing lines, it was incorrect then to conclude that plaintiffs should lose as a matter of law because they failed to demonstrate a high number of city splits or a bizarre shape. Basic adherence to these simple criteria, so easily complied with, does not license intentional discrimination.

## CONCLUSION

If left undisturbed, the district court's errors establish standards that would permit purposeful racial discrimination, despite the abhorrence of such race-based intent in the Constitution and federal civil rights law, to go unchallenged. Under the panel's reasoning, a minority group's attainment of some quantum of political power in a state could subject that group to intentional vote dilution, without any legal restraint or recourse. The district court also would immunize intentional racial classification of voters simply because the resulting districts are not segregated or bizarrely shaped, and do not split a substantial number of city lines. In both regards, the district court's reasoning undervalues the elimination of purposeful racial discrimination and consequently fails to accord proper significance to its assumption, required at the

[15] Again, as explained above, this assumption was well-supported by extensive evidence – direct and circumstantial – of racial purpose.

summary judgment stage, that plaintiffs could prove race-based intent to dilute the Latino vote. The Constitution, federal civil rights law, and this Court's precedent all assign a much higher value to eliminating intentional racial discrimination. The district court's errors raise substantial questions and set a dangerous precedent. This Court should note probable jurisdiction.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

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| MARIA CANO, et al.,<br>Plaintiffs,<br>vs.<br>GRAY DAVIS, et al.,<br>Defendants. | CASE NO. CV 01-08477 MMM (RCx)<br>THREE JUDGE COURT<br>Hon. Stephen Reinhardt<br>Hon. Christina A. Snyder<br>Hon. Margaret M. Morrow<br>OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT<br>(Filed Jun. 24, 2002)<br>(Entered June 24, 2002) |

Before REINHARDT, Circuit Judge, SNYDER and MORROW, District Judges.

Per Curiam:

Plaintiffs, who are Latino voters and advocacy groups, challenge two congressional districts and one state legislative district adopted by the State of California as part of its most recent redistricting process. Plaintiffs contend that the three districts violate the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and the Equal Protection Clause of the Fourteenth Amendment, under various legal theories. These theories raise challenging questions regarding the applicability of voting rights doctrines developed in a fundamentally different context than the rapidly-changing multi-racial and multi-ethnic community that is present-day Southern California. We conclude, with respect to each of the three districts at issue in this case,

that the legislature permissibly exercised its broad discretion to draw district lines, and that, in doing so, it violated neither the Voting Rights Act nor the Constitution. Accordingly, we grant in full defendants' and defendants-intervenors' motions for summary judgment.

## BACKGROUND

*Factual and Legal Background*

In the summer of 2001, California engaged in the decennial task of redrawing its state and federal legislative districts to account for population changes documented in the 2000 census. *Reynolds v. Sims,* 377 U.S. 533, 583-84, (1964) (requiring periodic redistricting); CAL. CONST. Art. XXI, § 1 (requiring legislative redistricting in the year following the national census). As a result of California's population growth relative to that of other states, the census disclosed that the state was entitled to one additional congressional seat. Accordingly, the legislature was charged with drawing 53 congressional districts, as well as the unchanged number of State Senate and Assembly districts prescribed by state law, 40 and 80 respectively. California requires that the districts in each of these categories be compact and contiguous, that they respect as much as possible the integrity of the boundary lines of political subdivisions such as cities and counties, and that they preserve other local communities of interest. CAL. CONST. Art. XXI, § 1; *Wilson v. Eu*, 823 P.2d 545, 552-53 (Cal. 1992).

Over the course of the summer of 2001, the legislature conducted public hearings throughout the state at which various public interest groups and others articulated general concerns regarding the redistricting process, and

proposed specific changes to the district lines that had been drawn after the 1990 census. Among those commenting was the highly-influential Mexican-American Legal Defense and Educational Fund ("MALDEF"), which serves as counsel to plaintiffs in this case.[1] At least two of the organizational plaintiffs in this case, as well as other Latino advocacy groups, also testified at the various hearings on redistricting. On August 31, 2001, the Senate Elections and Reapportionment Committee promulgated a proposed redistricting plan for State Senate and Congressional Districts. The principal map-drawing consultant retained by the Senate was Michael Berman, a fixture in California redistricting processes and the brother of Congressman Howard Berman, an incumbent in one of the congressional districts at issue in this case. It is alleged that Michael Berman was also retained by members of the California congressional delegation, many of whom paid his organization $20,000 a person to represent their interests in the redistricting process.[2]

A two-day legislative hearing was held on September 4-5 in Sacramento, with video-conferencing in other sites around the state, at which the Assembly and Senate

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[1] MALDEF, founded in 1968, is the most prominent national organization devoted to securing the civil rights of the more than 35 million Latinos living in the United States. Its national headquarters is in Los Angeles County.

[2] Defendants have challenged the admissibility of some of plaintiffs' evidence, principally on hearsay and privilege grounds. The admissibility of some of the testimony relating to Michael Berman's role in the redistricting process is disputed, as is much of plaintiffs' other evidence related to legislative intent. We need not rule on these objections. Rather, we assume the challenged evidence is admissible, because it does not affect the results we reach on the various claims.

redistricting committees heard public comment on the draft plan. Latino groups, among others, testified regarding the proposed Congressional and State Senate Districts. Some groups, including the Latino advocacy groups mentioned above, suggested changes; certain of these were adopted. Both houses of the California Legislature voted to enact the second version of the plan: the Senate voted 38-2 in favor of the bill on September 12, 2001; the next day the Assembly approved it by a margin of 70-10.[3] Twenty-three of the twenty-six Latino state legislators voted for the measure, including every Latino State Senator.

Governor Davis signed the redistricting plan into law on September 27, 2001. Plaintiffs filed this action several days thereafter, and this three-judge district court was convened pursuant to 28 U.S.C. § 2284(a). Plaintiffs are a number of Latino voters who reside in and adjacent to the districts that are challenged in the action, as well as several Latino advocacy and human service organizations. Defendants include Governor Gray Davis, Lieutenant Governor Cruz Bustamante, Secretary of State Bill Jones, Senate President John Burton, and Assembly Speaker Herb Wesson. Additionally, several parties, including the California Republican Party and the California State Senate, have intervened as defendants.[4]

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[3] The legislature was also required to re-draw the boundary lines for the Assembly and State Board of Equalization districts. Those new district lines were enacted in a separate piece of legislation. That bill passed the legislature simultaneously with the Congressional and Senate redistricting measure. It is not at issue in this litigation.

[4] For convenience, in this opinion we will refer to the defendants and defendants-intervenors collectively as "defendants." Several Los Angeles-area Latino community organizations, which argue that the

(Continued on following page)

Plaintiffs challenge the legality of three districts: Congressional District 28 ("CD 28"), which is located in the San Fernando Valley of Los Angeles County; Congressional District 51 ("CD 51"), the southernmost congressional district in the state, which includes portions of San Diego County and the entirety of Imperial County; and State Senate District 27 ("SD 27"), which is comprised of several communities in Southeast Los Angeles County, including parts of the City of Long Beach.

In their first amended complaint, plaintiffs advance three legal theories.[5] They allege a *Shaw* claim: a claim that CD28 and CD 51 are racially gerrymandered districts

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re districting plan adequately protects Latinos' ability to elect representatives of choice applied to intervene as defendants, as did black and Filipino groups from San Diego. Those applications were untimely, and we therefore permitted the groups to participate instead as *amici curiae*.

[5] Plaintiffs' complaint alleges only two claims for relief – one under the Voting Rights Act, 42 U.S.C. §§ 1973 et seq., and one under the Fourteenth Amendment. Plaintiffs' Fourteenth Amendment claim alleges, *inter alia*, that the Congressional Districts adopted have "no rational explanation except as an effort to separate voters on the basis of racial/ethnic origin." It further alleges that each district constitutes "an intentional gerrymander of the Latino population in violation of Plaintiffs' Equal Protection Rights guaranteed by the Fourteenth Amendment to the United States Constitution." From the beginning of the litigation, the parties and the court have understood this single claim to allege a constitutional violation under the theory articulated in *Shaw v. Reno*, 509 U.S. 630 (1993) (", and its progeny, as well as a traditional Equal Protection vote dilution claim. Plaintiffs' Voting Rights Act claim is similarly hybrid." It alleges that CD 28 and SD 27 were adopted "with the discriminatory purpose of fragmenting the Latino population in order to dilute the effect of the Latino vote in future elections." It further alleges that the districts "do not afford Plaintiffs an equal opportunity to elect representatives of their choice."

in violation of the Equal Protection Clause of the Fourteenth Amendment, under the cause of action first set forth by the Supreme Court in *Shaw v. Reno,* 509 U.S. 630, (1993) ("*Shaw I*"). They next allege that the legislature intentionally diluted the vote of Latinos in the San Fernando Valley and in San Diego County (the areas in which the two challenged congressional districts are located), in violation of both the Equal Protection Clause and § 2 of the Voting Rights Act. Finally, they allege that the new boundary lines of CD 28, as well as of SD 27 (located in Southeast Los Angeles County) have the effect of diluting the Latino vote in contravention of § 2 of the Voting Rights Act.

*Procedural History*

Soon after the complaint was filed, plaintiffs applied for a temporary restraining order ("TRO"), asking that this court enjoin the use of the new district lines and postpone the March, 2002, primary election until another districting plan could be adopted. On November 1, 2001, the court heard oral argument on plaintiffs' motion, and subsequently denied the TRO application. *Cano v. Davis,* 191 F. Supp. 2d 1135 (C.D.Cal.2001) (per curiam).

Two challenges to the state redistricting statute were filed in the California state courts. *See Andal v. Davis,* Sacramento Superior Court No. 01-CS-01397; *Kennedy v. Davis,* Santa Clara Superior Court No. CV-803679. Citing these two actions, defendants moved to defer adjudication of the case pursuant to the doctrine established in *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, (1941). Because it was altogether speculative that the state court actions, which involved districts in Northern

California, would lead to changes in the redistricting plan that would affect the districts challenged in this case, we denied the deferral motion. *Cano v. Davis,* 191 F. Supp. 2d 1140 (C.D. Cal. 2002) (per curiam). This court also decided motions asserting the legislative privilege of state legislators and their aides, filed in response to discovery demands by plaintiffs, *Cano v. Davis,* 193 F.Supp.2d 1177 (C.D. Cal. 2002), as well as a motion to quash the taking of depositions from certain members of Congress.

In light of the important statutory and constitutional claims asserted by plaintiffs, we established an expedited discovery and trial schedule; discovery was scheduled to conclude on May 31, 2002, and has been extended to June 14, 2002, by agreement of the parties. Defendants moved for summary judgment on all claims, and we set a hearing for May 13, 2002. Plaintiffs did not seek to defer the hearing, or our ruling on the motion, pending the completion of discovery. We conducted the hearing as scheduled and heard extensive oral argument.

## DISCUSSION

### I. Plaintiffs' Racial Gerrymandering Claims

Plaintiffs assert that both CD 28 and CD 51 violate the Equal Protection Clause under the "racial gerrymander" doctrine set forth in *Shaw I.* The districts in question, however, cannot reasonably be understood to segregate voters into racial enclaves, and thus fail to state a *Shaw* claim as a matter of law. We reject plaintiffs' expansive theory of the racial gerrymander doctrine, which would throw into doubt the validity of countless legislative districts nationwide. Moreover, even were such an expansive interpretation of the doctrine warranted, plaintiffs

have failed to offer evidence showing that the California legislature abandoned traditional districting principles in the configuration of these two districts, or subordinated those principles to racial considerations.

A. Background

In *Shaw I,* plaintiffs challenged on equal protection grounds North Carolina's 12th Congressional District, which was a majority-black district drawn primarily for the purpose of meeting the preclearance demands of the United States Department of Justice during the 1990 round of redistricting.[6] The shape of the 12th district was, to put it mildly, bizarre; it was a narrow, serpentine band that stretched for 160 miles along Interstate 85 and featured a series of tentacles reaching out from the interstate corridor to draw scattered and disparate black neighborhoods into the district. *Id.* at 635-36. It was the least geographically compact congressional district in the nation. *Shaw v. Hunt,* 517 U.S. 899, 906 (1996) ("*Shaw II*").

The *Shaw I* Court reversed the three-judge district court's dismissal of the action, and held that plaintiffs had

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[6] Forty of North Carolina's 100 counties are covered jurisdictions under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which means that North Carolina must receive approval from either the Justice Department or a three-judge court of the District of Columbia before implementing any change to voting procedures, including district lines. *Shaw I,* 509 U.S. at 634. As a result of the 1990 North Carolina redistricting, that state, which has a voting age population that is 20% black, elected its first two black congressmen since Reconstruction. *Id.* at 659 (White, J., dissenting).

stated a racial gerrymander claim under the Equal Protection Clause. *Id.* at 658. "In some exceptional cases," *Shaw I* held, "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters on the basis of race." *Id.* at 646-47 (internal citations and quotations omitted). As the Court subsequently explained, in order to prevail on what has come to be known as a *Shaw* claim, "[r]ace must not simply have been *a* motivation for the drawing of a majority minority district, but the *predominant* factor motivating the legislature's decision. Plaintiffs must show that a facially neutral law is unexplainable on grounds other than race." *Easley v. Cromartie,* 532 U.S. 234, 241-42 (2001) ("*Cromartie II*") (emphases in original) (internal citations and quotations omitted).

Although *Shaw I* relied primarily on the bizarre shape of the district at issue in concluding that it was an impermissible racial gerrymander, 509 U.S. at 647 ("[R]eapportionment is one area in which appearances do matter"), the Court held in *Miller v. Johnson* that a district need not "be bizarre on its face before there is a constitutional violation." 515 U.S. 900, 912 (1995). Rather, *Miller* held that a district's shape is relevant only as "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale for drawing its district lines." *Id.* at 913.

All of the racial gerrymandering cases emphasize that a plaintiff bringing such a claim faces an extraordinarily high burden. *See, e.g., Cromartie II,* 532 U.S. at 241 ("[T]he burden of proof on the plaintiffs (who attack the district) is a demanding one.") (internal citations and quotations omitted); *Miller,* 515 U.S. at 929 (O'Connor, J.,

concurring) ("*Shaw's* basic objective" is to "make[ ] extreme instances of racial gerrymandering subject to meaningful judicial review"); *Shaw I,* 509 U.S. at 646 (noting that a violation will only occur in "exceptional cases"). The Supreme Court has also recognized the undeniable reality that the interests of racial groups are often part of a legislature's rationale for drawing a particular set of district lines. *Miller,* 515 U.S. at 916 ("Redistricting legislatures will . . . almost always be aware of racial demographics. . . . "); *Shaw I,* 509 U.S. at 646 ("[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines . . . .") (emphasis in original). Indeed, as racial minorities continue to struggle to overcome the legacy of official discrimination in election practices, awareness of race is essential to fairness in districting. For this reason, the provisions of the Voting Rights Act oftentimes *require* a redistricting legislature to consider the effect of its decisions on the political power of racial groups, and to take race into account when drawing lines. 42 U.S.C. §§ 1973, 1973c. The necessity of considering race, at least to some degree, when redistricting, creates a tension between a legislature's constitutional obligations as set forth in *Shaw* and its obligations under the Voting Rights Act. *See Bush v. Vera*, 517 U.S. 952, 994 (1996) (O'Connor, J., concurring) ("The [Voting Rights Act] requires the States and the courts to take action to remedy the reality of racial inequality in our political system, sometimes necessitating race-based action, while the Fourteenth Amendment requires us to look with suspicion on the excessive use of racial considerations by the government."). It is for this reason that a *Shaw* violation will result only in the exceptional case in which a district is "unexplainable on grounds other than race" and the

particular harms described in *Shaw* occur. *Cromartie II,* 532 U.S. at 242, (internal quotations and citations omitted).

The *Shaw* doctrine is unusual in that, unlike most constitutional doctrines, it requires no concrete injury. Rather, one of the two principal harms identified in *Shaw I* is an "expressive" harm that results solely from the classification of voters on the basis of race, a practice the *Shaw I* Court held "bears an uncomfortable resemblance to political apartheid." 509 U.S. at 647; *see* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno,* 92 MICH. L. REV. 483, 485 (1993). This "expressive" harm "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw I,* 509 U.S. at 647. The other harm discussed in *Shaw I* is a "representational" harm. That is, when a district "obviously is created solely to effectuate the perceived common interests of one racial group," a representative elected from that district – who is supposed to represent *all* of his constituents, regardless of whether they supported him – will feel bound only to advance the interests of the racial group that dominates the district. *Id.* at 648.

B. Plaintiffs' Evidence of Purported Racial Gerrymandering Does Not Establish A *Shaw* Violation.

Plaintiffs allege that both CD 28 and CD 51 constitute impermissible racial gerrymanders. With respect to CD 51, plaintiffs assert that the exclusion from the district of certain Latino neighborhoods in the City of San Diego,

including Barrio Logan, Logan Heights, Golden Hill, Sherman Heights and others, violated the Equal Protection Clause under the doctrine established in *Shaw I*. All but one of these neighborhoods had previously been represented by Congressman Robert Filner, the incumbent in CD 51 (which had been numbered CD 53 following the enactment of the 1990 Special Masters' Plan);[7] plaintiffs allege that the failure to include the areas in the reconfigured district violates *Shaw* because the legislature's decision was based solely on racial considerations. According to plaintiffs, the legislature excluded the neighborhoods in question in order to maintain a specific racial balance in the district. Plaintiffs make similar arguments with respect to CD 28. There, the legislature's redistricting plan placed Latino neighborhoods in Van Nuys, Sylmar, and Burbank that were previously represented by the incumbent congressman, Rep. Howard Berman, in a neighboring congressional district (although a small portion of the transferred territory was assigned to a third district that also adjoined the district represented by Berman). Plaintiffs contend that the legislature removed these areas from CD 28 (which had previously been numbered 26 following enactment of the Special Masters' Plan), solely to reduce the number of Latinos in that district.

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[7] The legislative redistricting process in California that followed the 1990 census was completed by special masters appointed by the California Supreme Court after the legislature and governor reached an impasse and could not adopt a redistricting plan in time for the 1992 primary elections. *Wilson v. Eu*, 823 P.2d 545, 548 (Cal. 1992). We refer to that redistricting plan in this opinion as the "Special Masters' Plan."

Even assuming plaintiffs' allegations of racial intent to be true,[8] as we do for purposes of this summary judgment motion, the rationale underlying *Shaw* is simply inapplicable to the districts at issue here.[9] Plaintiffs' two *Shaw* claims are not addressed to the types of districts ordinarily at issue in the Supreme Court's racial gerrymandering cases. For one, these are not race-based districts that "balkanize us into competing racial factions" or deliberately segregate voters into separate racial enclaves. *Shaw I*, 509 U.S. at 657. They cannot, under any fair reading, be characterized as "white districts" or "Caucasian districts." Nor are they districts that can only be reasonably understood to "belong" to one ethnic or racial group.

To the contrary, the districts at issue here are diverse and multi-ethnic: each contains a variety of racial and

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[8] We have doubts as to whether the type of direct evidence put forward by plaintiffs regarding the intent of the legislature as a whole is sufficient to raise a triable question of fact regarding that subject. *City of Las Vegas v. Foley*, 747 F.2d 1294, 1299 (9th Cir. 1984) (holding that the subjective intent of individual legislators is irrelevant to establishing the motivation of the entire legislature). Plaintiffs have adduced, for example, the testimony of a member of the legislature, who offers an opinion regarding the intent of the body. For the purpose of deciding this motion, however, we assume that such testimony correctly describes the legislature's intent.

[9] This is so not because plaintiffs here are members of a minority group. Plaintiffs characterize defendants' arguments against the *Shaw* claims in this case as asserting that non-white plaintiffs cannot bring a racial gerrymandering claim. To the extent that this characterization is accurate, we reject the argument. The language of the racial gerrymandering cases makes clear that the claim may be brought by any person regardless of race. *Shaw I*, 509 U.S. at 650-51; *see Diaz v. Silver* 978 F. Supp. 96, 97-98 (E.D.N.Y. 1997) (three-judge court) (black and Latino plaintiffs have standing to challenge an alleged racial gerrymander that created a majority-Puerto Rican congressional district).

ethnic groups; none unites any single group of individuals within its boundaries for the purpose of permitting that group to exercise hegemony. In fact, Latinos are the largest number of persons in any single racial or ethnic group in each district, and the number of whites in each case is substantially lower. In CD 28, for example, the voting-age population is 49.2% Latino, 37.2% white, 6.9% Asian, and 4.3% black. Congressional District 51 is even more diverse: in that district the voting-age population is 49% Latino, 25.1% white, 13.8% Asian, and 9.7% black. There is no evidence that the legislature sought to ensure that voters of any particular race would dominate either district.[10] Perhaps for this reason, one searches the record in vain for evidence of the type of harms that *Shaw* claims

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[10] In *Bush v. Vera*, the Supreme Court struck down Texas's 30th Congressional District as a racial gerrymander. That district featured demographics that in some respects appear to be similar to the demographics of CD 28 and CD 51; its population was 50.9% black, 17.1% Hispanic, 31.4% white, and 2.4% other. 517 U.S. at 965; Javier Aguilar, *Congressional Redistricting in Texas: Time for a Change*, 27 STETSON L. REV. 781, 802 n. 154 (1998). However, there is a fundamental difference between that district and those at issue here. The Texas district was found to be a racial gerrymander that constituted a race-based black district, and in fact blacks comprised more than half of the population. In contrast, in CD 28 and CD 51 – which plaintiffs contend, in essence, were drawn as "white" districts – the largest single group is Latinos, and whites constitute a far smaller percentage of the populations in each.

Moreover, on the basis of its unusual geographic configuration, which included an overwhelmingly black core from which tentacles extended to grab far-flung black neighborhoods, the Texas district could only be reasonably understood by any objective observer as a "black" district. *See* discussion n. 12, *infra*. That district's configuration every respect is starkly different from those of CD 28 and 51.

are designed to remedy – the "representational" and "expressive" harms described in *Shaw I.*[11]

First, it is impossible to conclude that either district gives rise to the type of "representational" harm described in *Shaw I.* In neither district does any single racial or ethnic group comprise more than 39.8% of the registered electorate. It would therefore be political folly, if not suicide, for a representative in either district to consider it his "primary obligation" to act as the representative of a single racial or ethnic group. *Shaw I,* 509 U.S. at 648. The message sent to future representatives by the creation of these two districts is not a "pernicious" one: that "they represent a particular racial group rather than their constituency as a whole." *Id.* To the contrary, the message communicated by the redistricting plan is that in order to succeed in either of these districts a representative must build and maintain multi-racial coalitions. *Cf. Johnson v. De Grandy,* 512 U.S. 997, 1020 (1994) ("[M]inority voters are not immune from the obligation to pull, haul and trade to find common political ground . . . .").

Nor is there evidence of the "expressive" harm that the Court described in *Shaw I.* These districts are not assemblages of ". . . individuals who belong to the same

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[11] Indeed, plaintiffs' expert, Dr. J. Morgan Kousser, stated, in a paper prepared and submitted to the California legislature during its redistricting efforts, that the "concerns that the Supreme Court mentioned in *Shaw v. Reno* and subsequent related opinions cannot apply to districts in which there is no ethnic majority of voters." While, on such a matter of law, Dr. Kousser's opinion is not binding on this court, it is telling that plaintiffs' expert, who served as a consultant to plaintiffs' counsel, MALDEF, during the redistricting process, holds such a view.

race, but who are otherwise widely separated by geographical and political boundaries, and . . . have little in common with one another but the color of their skin." *Shaw I,* 509 U.S. at 647. Rather, each of the districts is ethnically diverse, and no one group constitutes a majority in either. Their demographic make-up thus conveys no message that constitutional principles have been disregarded, or that the legislature sanctions racial classifications.

This is particularly true when one considers the shape of the districts in question. *See Miller,* 515 U.S. at 912 (noting that the harm in *Shaw I* derived from the "appearance [of the district] in combination with certain demographic evidence."). Where a district's shape signals that it was created for the purpose of aggregating voters of a particular race, without regard to whether they have distinct interests besides their shared racial heritage, a *Shaw* violation may result. *Shaw I,* 509 U.S. at 647. Where such graphic indicia of racial districting are absent, the likelihood of "expressive harm" is reduced, if not eliminated. *See* Pildes & Niemi, *supra,* at 614 ("Race-as-a-factor districts of a more compact nature are less likely to send these messages. Rather, they are likely to be viewed as primarily dependent on neutral, nonracial facts, such as geographical and political boundaries. To be sure, a racial group may be disproportionately present in compact districts, but this can be seen as the result of residential housing patterns, not an intent to draw a line in order to reaffirm racial differences."). While, as noted earlier, the Court has instructed that a district need not "be bizarre on its face before there is a constitutional violation," *Miller,* 515 U.S. at 912, it is nonetheless true that the shape of the districts has been a significant factor in the outcome of the

*Shaw* cases. *See, e.g., id.* at 917. *See also Vera,* 517 U.S. at 965; *Id.* at 972; *Id.* at 973-74; *Cromartie II,* 532 U.S. at 240, 243.[12]

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[12] The Court's discussion in each of these passages is instructive. *See Miller,* 515 U.S. at 917 ("In our view, the District Court applied the correct analysis, and its finding that race was the predominant factor motivating the drawing of the Eleventh District was not clearly erroneous. The court found it was 'exceedingly obvious' from the shape of the Eleventh District, together with the relevant racial demographics, that the drawing of narrow land bridges to incorporate within the district outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district. . . . Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer."). *See also Vera,* 517 U.S. at 965 ("Fifty percent of the [District 30's] population is located in a compact, albeit irregularly shaped, core in south Dallas, which is 69% African-American. But the remainder of the district consists of narrow and bizarrely shaped tentacles – the State identifies seven 'segments' – extending primarily to the north and west. . . . Over 98% of the district's population is within Dallas County, . . . but it crosses two county lines at its western and northern extremities. . . . "); *Id.* at 972 ("District 30's combination of a bizarre, noncompact shape and overwhelming evidence that that shape was essentially dictated by racial considerations of one form or another is exceptional; Texas Congressional District 6, for example, which Justice Stevens discusses in detail, . . . has only the former characteristic. That combination of characteristics leads us to conclude that District 30 is subject to strict scrutiny."); *Id.* at 973-74 ("District 18[ ] . . . 'has some of the most irregular boundaries of any congressional district in the country[,] . . . boundaries that squiggle north toward Intercontinental Airport and northwest out radial highways, then spurt south on one side toward the port and on the other toward the Astrodome.' . . . Its 'many narrow corridors, wings, or fingers . . . reach out to enclose black voters, while excluding nearby Hispanic residents.' . . . District 29 . . . resembles " 'a sacred Mayan bird, with its body running eastward along the Ship Channel from downtown Houston until the tail terminates in Baytown. Spindly legs

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The districts drawn by the legislature in the San Fernando Valley and in San Diego/Imperial Counties do not signal that voters were placed in one district or another because of their race. Indeed, both their shape and the balance of the evidence in the record suggests that the legislature did not violate the principle that race is a *permissible* criterion to use in the redistricting so long as it is not the *predominant* criterion. In the case of each district, the population shifts that are the subject of plaintiffs' *Shaw* claims represent a relatively minor portion of the districts at issue. Moreover, the removals of Latino voters were made at the margins or perimeters of the districts, and the districts as a whole remained largely unchanged (except for the added territories).[13] The most

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reach south to Hobby Airport, while the plumed head rises northward almost to Intercontinental. In the western extremity of the district, an open beak appears to be searching for worms in Spring Branch. Here and there, ruffled feathers jut out at odd angles.' " . . . Not only are the shapes of the districts bizarre; they also exhibit utter disregard of city limits, local election precincts, and voter tabulation district lines.") (citations omitted); *Cromartie II,* 532 U.S. at 240, 243 (noting that the Court had considered "the district's snakelike shape, the way in which it split cities and towns and its heavily African-American (47%) voting population," and "found [such factors] insufficient to support summary judgment").

[13] This is best illustrated by the district maps provided by plaintiffs, which demonstrate that the core of the districts remained the same, although different territory was added to or removed from the perimeters. Plaintiffs fail to provide the precise number of voters whose removal from CD 28 gives rise to the alleged *Shaw* violation. An approximation can be calculated, however, using plaintiffs' statistical evidence, which reveals that the district now contains 14,438 fewer Latino registered voters than it did before the boundary lines were redrawn. The district as a whole contains 234,017 registered voters. In the case of CD 51, the Latino population increased as a result of the

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recent of the Supreme Court's racial gerrymandering cases, *Cromartie II,* illustrates that such discrete population shifts cannot constitute a *Shaw* violation. In that case, there was evidence presented that the state legislature's map-drawing consultant had moved approximately 60,000 black voters into a district, presumably on the basis of their race. 532 U.S. at 254. Nevertheless, the *Cromartie II* Court reversed the three-judge district court's finding of a *Shaw* violation as clearly erroneous, because there was insufficient evidence to show that the district was *unexplainable* on a basis other than race. *Id.* at 257. The same holds true here; even if the perimeter Latino neighborhoods in question were removed from the districts intentionally because of their ethnic demographics, there is no evidence in the record that either district as a whole is a "white" district or that it is explainable only in terms of race. To adopt plaintiffs' sweeping construction of the racial gerrymandering doctrine would render suspect virtually any legislative decision regarding the districts in which to place areas or groups of precincts that are predominantly populated by one racial or ethnic group. Such an approach would render meaningless the guarantee that the *Shaw* doctrine "does not throw into doubt the vast majority of the Nation's 435 congressional districts . . . even though race may have been considered in the redistricting process." *Miller,* 915 U.S. at 928-29 (O'Connor, J., concurring).

Plaintiffs contend that a group of Latino residents was excluded from each of CD 28 and CD 51 in order to ensure

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change, and the number of Latino registered voters grew by 14,833. The district as a whole contains 251,256 registered voters.

that the number of Latino residents in those districts did not rise above a certain percentage. To the extent that this is true, it implicates the Equal Protection Clause as a claim of constitutional vote dilution, not as an "analytically distinct" claim of racial gerrymandering. *Miller,* 515 U.S. at 915. What plaintiffs seek as a *Shaw* remedy is a redistricting plan that contains the maximum number of majority-Latino districts possible. This is not a requirement of constitutional districting. *See Shaw II,* 517 U.S. at 913 ("We have recognized that a 'State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan "so discriminates on the basis of race or color as to violate the Constitution". . . ."') (quoting *Miller,* 515 U.S. at 924). *Cf. De Grandy,* 512 U.S. at 1017 ("Failure to maximize cannot be the measure of § 2"). To hold otherwise would subvert the most basic principle of *Shaw* and the subsequent racial gerrymandering cases.

C. Plaintiffs Put Forth No Evidence That Traditional Districting Principles Were Not Followed and Were Subordinated to Racial Considerations.

Defendants are also entitled to summary judgment for another reason made clear in both *Shaw I* and *Miller*: plaintiffs have failed to raise a question of material fact as to whether, in drawing CD 28 and CD 51, the state abandoned its traditional districting principles, or subordinated them to racial considerations. This is so because no reasonable trier of fact could conclude from the evidence in the record that in either district the legislature "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and

respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller,* 515 U.S. at 916.

In order to prevail on a *Shaw* claim, a plaintiff must demonstrate both that the legislature was predominantly motivated by racial intent in constructing the challenged district and that it ignored traditional districting principles in its zeal to pursue a racial objective. *Cromartie II,* 532 U.S. at 1458; *Shaw II,* 517 U.S. at 902; *DeWitt v. Wilson,* 856 F. Supp. 1409, 1412-13 (E.D. Cal. 1994) (three-judge court), aff'd., 515 U.S. 1170 (1995).

Perhaps the paramount race-neutral districting principle under California law is the constitutionally-mandated and court-ordered principle that legislative districts follow local political subdivision boundaries to the extent possible consistent with other districting requirements. CAL. CONST., Art. XXI; *Legislature v. Reinecke*, 516 P.2d 6, 10 (Cal. 1973).[14] Courts examining racial gerrymandering claims have found adherence to local political subdivisions to be highly probative evidence that a district does not violate the Equal Protection Clause. *See, e.g., Harvell v. Blytheville Sch. Dist*, 126 F.3d 1038, 1041 (8th Cir. 1997) (rejecting a *Shaw* challenge to a district court's remedial plan in a § 2 vote dilution case in part because

[14] Chief among those other districting principles is the federal constitutional rule that congressional districts must be precisely equipopulous. *Karcher v. Daggett,* 462 U.S. 725, 730 (1983); *Gray v. Sanders,* 372 U.S. 368, 381 (1963). In California, the ideal congressional district size for redistricting purposes in 2001 was 639,088. The size of the two districts, as reconfigured in 2001, was identical: the near-ideal 639,087.

the remedial districts, although majority-minority, did not split local political units).

The districts challenged here under *Shaw* are reasonably compact and contiguous. They are no more irregular in shape than any other district created by the legislature, and certainly do not constitute a threshold showing of bizarreness that would support an inference that the districts are racially gerrymandered.[15] There is undisputed evidence in the record that the redistricting statute both achieved the precise mathematical equality in congressional district populations required by *Karcher v. Daggett,* 462 U.S. 725, 730 (1983), and decreased the number of city-splits in congressional districts statewide from 144 to 32. More important, though, there is also specific, uncontradicted evidence that the traditional districting principles applied statewide were not abandoned, but rather were rigorously applied, in the configuration of both CD 51 and CD 28.

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[15] We recognize that a showing of bizarre shape is not a necessary condition for a successful *Shaw* claim. *Miller,* 915 U.S. at 913. Nevertheless, shape remains a highly probative method of proving that a district is primarily race-based, and the vast majority of successful racial gerrymandering claims have challenged bizarrely shaped districts. *See Chen v. City of Houston,* 206 F.3d 502, 509-13 (5th Cir. 2000); *Diaz,* 978 F. Supp. at 118; *Moon v. Meadows,* 952 F. Supp. 1141, 1147 (E.D. Va) (three-judge court), aff'd. 521 U.S. 1113 (1997); *but see Smith v. Beasley,* 946 F. Supp. 1174, 1185 (D.S.C. 1996) (three-judge court).

1. Congressional District 51 (San Diego and Imperial Counties)

In the case of CD 51, the entirety of Imperial County was added to the district, which had previously been comprised only of portions of San Diego County. Although this addition resulted in the district becoming less compact, the inclusion of Imperial County occurred between the first and second drafts of the plan at the urging of Latino advocacy organizations which contended that the Latino residents of Imperial County shared a community of interest with the Latino residents of San Diego County, because both counties are situated adjacent to the Mexican border. In light of the addition of the 142,361 residents of Imperial County to CD 51, there is no question that it was necessary to remove other areas from the district in order to maintain the required population level. There is also no question that the areas that were removed were largely Latino neighborhoods. It is the removal of these neighborhoods that plaintiffs challenge.

The objective and undisputed evidence demonstrates that in determining what changes should be made with respect to the geography and demographic composition of the district, the legislature respected local political subdivision lines and, for the most part, kept existing communities of interest united in the district. The district includes Imperial County in its entirety, for instance, rather than solely Latino or non-Latino enclaves from within that county. The district also includes the entire cities of Chula Vista and National City, and does not subdivide either of those localities. Although CD 51 contains just a portion of the City of San Diego, that city is too large to be contained in any single congressional district; thus, that city-split was unavoidable. Moreover, the district maintains intact

black and Filipino communities of interest; the record contains undisputed evidence that leaders of both those communities sought to keep their neighborhoods in CD 51 because of an affinity for Rep. Filner and approval of the leadership role he has assumed on issues of importance to them.[16] Finally, the portion of CD 51 that the legislature removed during redistricting in order to compensate for the addition of Imperial County is a compact area on the northwestern perimeter of the district; in making this choice, the legislature preserved the essential core of the previous district.

As in *Cromartie II,* defendants also offer the justification that politics, not race, was the reason that the legislature chose to remove particular areas from the district. Here, the proffered political explanation is the desire to strengthen the dominant political party's electoral base in a politically-marginal district that abuts CD 51.[17] The adjacent district, CD 53, to which the neighborhoods were

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[16] The alternative district proposed by the Latino advocacy groups during the redistricting process eliminated these communities from CD 51. The district originally proposed by plaintiffs in connection with their application for temporary restraining order similarly excised these communities. As part of their submission in opposition to the motions for summary judgment, plaintiffs have proposed a district that includes these communities in CD 51.

[17] This version of incumbency protection differs from plaintiffs' allegations that the state intentionally limited the Latino population in certain districts so as to protect incumbents from a primary challenge. Here, the state justifies its shift of Latinos on the ground that the addition of the heavily Democratic Latino precincts to a marginal Democratic incumbent's district will protect the incumbent against a Republican general election opponent.

transferred, was represented by Rep. Susan Davis, a first-term Democrat who defeated a Republican incumbent in 2000. Before the redistricting, CD 53 – in contrast to CD 51 – was hardly a safe Democratic seat: it contained 39.1% Democrats and 36% Republicans. By the end of the decade, because of population shifts, it also contained 52,000 persons fewer than the ideal congressional district. As a result of the redistricting plan, CD 53 is now a much safer Democratic seat: 42.3% of its voters are registered Democrats, and 32% are enrolled as Republicans. It now also meets precisely the equipopulous requirement. *See* n. 14, *supra*.

Plaintiffs do not dispute that the transfer of Latino neighborhoods into CD 53 raised the proportion of Democratic voters in that district; they merely respond that defendants might have achieved the same goal without transferring Latino voters from CD 51 to CD 53. Whether this assertion is true – and we assume in connection with this motion that it is – is irrelevant for purposes of *Shaw* liability. Defendants have come forward with a substantial, uncontroverted non-racial reason for the drawing of the lines in CD 51: the protection of an incumbent in an adjoining district, a well-established legitimate districting criterion. *White v. Weiser*, 412 U.S. 783, 793-97 (1973).

Most important, plaintiffs have put forth no specific evidence demonstrating that defendants abandoned traditional districting principles when drawing CD 51. The district constitutes a typical Congressional district that comports with traditional districting principles.

Plaintiffs dispute this, arguing that the evidence they have adduced that Latino voters were excluded from CD 51 based on their race mandates that this claim proceed to

trial.[18] Citing the Supreme Court's reversal of the district court's grant of summary judgment in favor of the

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[18] The evidence plaintiffs proffer regarding intent is the following: (1) that Latiño communities that had been placed in CD 51 by the Special Masters' Plan ten years earlier were placed within another district; (2) that Assembly Member Juan Vargas understands this was done because the principal map drawer, whose firm had been paid $20,000 by the incumbent, wished to ensure that the percentage of registered Latino voters in the district did not exceed 40%; (3) that Latino advocacy groups warned the legislature that their proposed districting plan violated Latinos' civil rights and nonetheless rejected alternative plans that would have placed the Latino communities at issue within CD 51; (4) that, as contrasted with the Assembly, the State Senate utilized a secretive process, and made its intended district lines available to the public late in the process by way of data that was not easily accessible; (5) that the intended Senate-Assembly conference committee was scrapped and the districting legislation was placed in an entirely different bill than that originally proposed to move the legislation to the floor; and (6) that old CD 50, which became CD 51, saw a dramatic increase in the number of Latinos who were registered Democratic voters between 1990 and 2000, such that a Latino candidate was able to mount a serious challenge to the white incumbent. Plaintiffs also offer the expert opinion of Dr. Kousser based on these facts that race was the predominant factor in the drawing of district lines.

For purposes of this motion, we accept all of these facts as indicia of intent. We question, however, whether a legislature can be said to have acted with racially discriminatory intent simply because it did not adopt the districting preferences of advocates who asserted that its intended decision would violate the law. We further question whether, simply because a district has seen a large increase in a particular ethnic population, and there has been a difficult race between a member of that ethnic group and an [sic] white incumbent, any exclusion of members of the group from the district is evidence of racial motivation. This is particularly true where the percentage of voters included within that group was actually *increased* in the districting plan over what it had been at the time the election occurred. This is the case in CD 51, in which Latino registration increased from 35.04% to 39.84%, and Latino Democratic registration increased from 40.31% to 47.49%.

plaintiffs in *Hunt v. Cromartie,* plaintiffs argue that "[t]he legislature's motivation is itself a factual question," 526 U.S. 541, 549 (1999) ("*Cromartie I*"), and thus that summary judgment is not proper. Specifically, they contend that, having produced *some* evidence that some voters were placed in CD 51 or CD 53 based on their race, there is necessarily a triable issue of fact as to whether race was the *predominant* factor in the districting decision. In essence, plaintiffs contend that summary judgment is never available to a defendant on a *Shaw* claim where any evidence of intent is present. This is not the case.

It is true that the *Cromartie I* Court stated that "[r]easonable inferences from the undisputed facts [could] be drawn in favor of a racial motivation finding or in favor of a political motivation finding," and thus that "it was error for the District Court to resolve the disputed fact of motivation at the summary judgment stage." *Id.* at 552. We note, however, Justice Stevens' observation in his concurring opinion that the Court did "not have before [it] the question whether the District Court erred in denying the State's motion for summary judgment. . . ." *Id.* at 558 (Stevens, J., concurring). Subsequently, the Court reversed the district court's entry of judgment in plaintiffs' favor following trial, holding that their evidence of intent was not adequate to prove a *Shaw* violation. *Cromartie II,* 532 U.S. at 257-58. The history of *Cromartie II* convinces us that it is permissible to determine on summary judgment that the evidence of intent proffered by a *Shaw* plaintiff is not sufficient, under the "demanding" burden such a plaintiff admittedly has, *see id.* at 241, to raise an inference that race was the predominant motivation for a districting decision.

Our view of the evidence in the present case, moreover, is informed by the Supreme Court's statement in *Vera,* 517 U.S. at 962, that "neglect of traditional districting criteria is . . . [a] necessary" element of a *Shaw* claim. *See also Cromartie II,* 532 U.S. at 241 (". . . those who claim that a legislature has improperly used race as a criterion . . . must show at a minimum that the 'legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'").

Plaintiffs contend that, having put forward some evidence of intent, they have no burden other than to meet any non-racial explanations for the district proffered by defendants. They assert they have drawn maps that show that the legislature could have kept the Latino communities at the northwestern boundary of CD 51 within the district, and that this demonstrates that traditional districting criteria do not explain the decision that was made. The fact that the district could have been drawn differently, however, does not demonstrate that traditional districting principles were *subordinated* to race. Here, as detailed above, the undisputed evidence shows that the district in question is relatively compact and contiguous, that it does not split cities, and that it meets the state's obligation to draw equipopulous districts. Also as noted, the legislature has proffered a non-racial justification for placing the Latino communities in question in CD 53 – to increase the Democratic registration of that district, which was the lowest of any district represented by a Democratic member of Congress in the state, and which remains the lowest following redistricting. The fact that this could have been achieved by placing the Latino communities in CD 51 and moving other Democratic voters to CD 53 is not evidence that traditional districting principles were

subordinated to race. *See id.* at 249 ("we recognize that some . . . other ways [to create a safely Democratic district] may exist. But, unless the evidence also shows that these hypothetical alternative districts would have *better* satisfied the legislature's other nonracial political goals *as well as* traditional nonracial districting principles, this fact alone cannot show an improper legislative motive.") (emphasis supplied). This is particularly true since the court must accord a presumption of good faith to the legislative decision. *See Miller,* 515 U.S. at 916.

"[A] legislature's compliance with 'traditional districting principles such as compactness, contiguity, and respect for political subdivisions' may well suffice to refute a claim of racial gerrymandering." *Id.* at 919. Here, given the configuration of the district, and the nature of the changes made during the districting process, the record shows, at most, that the legislature took race into account *along with* traditional districting principles. Yet a *Shaw* claim exists "[o]nly if traditional districting criteria are *neglected* . . . predominantly due to the misuse of race. . . . " *Vera,* 517 U.S. at 993 (O'Connor, J., concurring) (emphasis supplied). As there is no evidence that such principles were "neglected" in drawing CD 51, plaintiffs' *Shaw* claim must fail.

A word must be said about the evidentiary significance of the opinion offered by Dr. J. Morgan Kousser, plaintiffs' expert. Relying on the intent evidence described above, Dr. Kousser offers the opinion that race was the predominant factor in the legislature's decision to draw CD 51 as it did. As the Court stated in *Cromartie II* regarding the similar opinion of plaintiffs' expert in that case, "this statement of the conclusion is no stronger than the evidence that underlies it." 532 U.S. at 249. Having

concluded that plaintiffs' evidence of racial intent – the very evidence on which Dr. Kousser relies – does not raise a triable issue of fact regarding the subordination of traditional districting principles to race in constructing CD 51, Dr. Kousser's statement to the contrary likewise cannot suffice. While he focuses heavily on evidence of intent, Dr. Kousser does not squarely address whether the legislature neglected traditional districting principles. Indeed, he acknowledges that "MALDEF drew districts in the same general areas [as the legislature] that appear just as compact." As respects CD 51 in particular, he asserts only that the legislature's district is "no more compact than MALDEF's suggestion," and "cannot be said to preserve communities of interest more adequately than its alternatives."[19] These statements suffer the same fate as the argument advanced in plaintiffs' brief that CD 53 could have been strengthened for the Democratic incumbent, Davis, by moving voters other than those in the Latino communities to the north and west of CD 51 into her district.[20] While there may be "other ways" to achieve

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[19] To the extent that plaintiffs contend that rejection of the MALDEF redistricting plan constitutes evidence of discriminatory intent, we note that MALDEF's plan adhered to traditional districting principles less rigorously than did the legislature's final plan. Dr. Kousser asserts that cities and neighborhoods were split in both the legislature's and MALDEF's plan. Yet the facts are undisputed that the legislature's plan respected city boundaries more than the alternative proposed by MALDEF, and more than the remedial district proposed by plaintiffs for purposes of this litigation. The plans proposed by plaintiffs and MALDEF, moreover, deviate from the equipopulous standard that the legislature had to meet more than the plan ultimately adopted.

[20] The fact that a plan proposed by the Assembly map drawers would have strengthened Democratic registration in Davis' district even more than the plan ultimately adopted (or the alternative proposed by

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the legislature's objectives, the evidence "must show that the[ ] hypothetical alternative districts would have *better* satisfied the legislature's other nonracial political goals *as well as* traditional nonracial districting principles" before a *Shaw* claim can be stated. *Cromartie II,* 532 U.S. at 249 (emphasis supplied).

In short, while we accept for purposes of this motion plaintiffs' allegation that race impacted the drawing of CD 51, plaintiffs have failed to raise a triable issue regarding the "neglect" of traditional districting principles that is a "necessary" element of their *Shaw* claim. *Vera,* 517 U.S. at 962. They have thus failed to raise a genuine issue of material fact as to whether the district is unexplainable on grounds other than race.

2. Congressional District 28 (San Fernando Valley)

Congressional District 28 is also a compact and contiguous district that does not deviate from the ideal size. As with CD 51, plaintiffs have put forward no evidence that the reconfigured CD 28 departs from traditional districting principles. While plaintiffs have offered evidence that CD 28 was drawn with some consciousness of race, that alone is insufficient to support a *Shaw* claim.

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MALDEF during the redistricting process) does not alter the fact that Democratic registration in CD 53 was increased. While Dr. Kousser contends that the Democratic registration in Davis' district was reduced, this is belied by other evidence plaintiffs have submitted, which shows that it was in fact increased by more than 10%. It is also belied by plaintiffs' admission that "AB 632 increased the percentage of Congressional District 53 that is comprised of registered Democrats."

*DeWitt,* 856 F. Supp. at 1415 (concluding that the redistricting plan developed by Special Masters and approved by the California Supreme Court "is not racial gerrymandering, but rather a thoughtful and fair example of applying traditional redistricting principles, while being conscious of race.").

Plaintiffs allege that map-drawer Michael Berman moved Latino voters out of CD 28 so as to reduce the efforts his brother, the incumbent, would be required to make in order to defeat a potential primary challenge by a future Latino candidate. In particular, Michael Berman allegedly sought to limit the number of Latino voters in the district so that his brother would not have to leave his legislative activities in Washington, D.C., and travel to California frequently in order to ensure his re-election. We assume, for the purpose of this motion, that such was Michael Berman's intent, and that the legislature as a whole adopted it.[21] Additional evidence of a race-conscious motive in the drawing of district lines is found in a statement made by the Senate Redistricting Committee Chair,

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[21] Gonzalez's declaration consists of the hearsay repetition of conversations he allegedly had with Rep. Berman. Plaintiffs sought to depose three sitting members of Congress: Howard Berman, Brad Sherman, who represents the district adjacent to CD 28, and Robert Filner. Plaintiffs contend that these depositions would have revealed that the congressmen instructed Michael Berman to limit the number of Latinos in each district. The congressmen sought to quash the subpoenas on the ground that the exceptional circumstances required to justify the deposition of a high-ranking government official are absent here. We deferred ruling on the motion to quash in light of the pending summary judgment motions. We will, for purposes of this motion, assume that the depositions would have produced the information plaintiffs allege.

Sen. Don Perata, at a public hearing. In that statement, Sen. Perata offered his opinion that the representation of Latinos would be enhanced by the movement of some Latinos from the district of Rep. Howard Berman, an "ardent supporter of Latino issues," to the neighboring district of Rep. Brad Sherman, to "encourage Congressman Sherman . . . to take leadership on issues of concern to the Latino community as Howard Berman has done for the past 30 years."[22]

Plaintiffs argue that Sen. Perata's statement, "by itself," necessitates denying defendants' summary judgment motion, as it "directly announces a singular,

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[22] In addition to their allegations regarding Michael Berman's intent and the statement of Sen. Perata, plaintiffs cite the following evidence that they contend demonstrates racial considerations were involved in constructing CD 28: (1) the horseshoe/stake configuration of CD 28 and neighboring CD 27; (2) the sequence of the legislature's two districting proposals, each of which split Latino communities in the northern part of the proposed district that had been joined under the Special Masters' Plan; (3) the fact that the map decreased the percentage of Latinos in CD 28; (4) the fact that, despite warnings by Latino advocacy groups that the legislature's proposed districting plan violated Latinos' civil rights, the legislature rejected alternative plans that would have placed the Latino communities at issue within CD 28; (5) the fact that, as contrasted with the Assembly, the State Senate utilized a secretive process, and made its intended district lines available to the public late in the process by way of data that was not easily accessible; and (6) the fact that the district saw a dramatic increase in the number of Latinos who were registered Democratic voters between 1990 and 2000. As they did with CD 51, plaintiffs also offer the expert opinion of Dr. Kousser based on these facts that race was the predominant factor in the drawing of district lines. Consistent with our consideration of plaintiffs' evidence regarding CD 51, we accept these facts as indicia of intent for purposes of this motion. As noted, however, we question whether some of plaintiffs' evidence is probative of racially discriminatory intent. See n. 18, *supra*.

race-based motivation for drawing the map to split the Latino community between two congressional districts." Read in context, Sen. Perata's statement was a response to the concerns that had been raised by Latino advocacy groups about CD 28 during the course of the redistricting process. It is essentially equivalent to the statement the Supreme Court found insufficient to support a *Shaw* claim in *Cromartie II*. *See* 532 U.S. at 253 ("We agree that one can read the statement about 'racial . . . balance' . . . to refer to the current congressional delegation's racial balance. But even as so read, the phrase shows that the legislature considered race, along with other partisan and geographic considerations; and as so read it says little or nothing about whether race played a *predominant* role comparatively speaking") (emphasis original).

Moreover, even coupled with plaintiffs' other evidence regarding intent, the statement is not sufficient to raise a triable issue as to whether traditional districting principles were subordinated to race. Plaintiffs assert that the horseshoe/stake shape of the district supports an inference that race predominated, citing the fact that old CD 24 and 26, which CD 27 and 28 replaced, were essentially circular or oblong in configuration. The fact that CD 28 is surrounded on two sides by parts of CD 27, however, does not suggest out-of-the-ordinary districting. The district is relatively compact and contiguous; it does not have tentacles, appendages, land bridges, corridors, or wings. *See Vera,* 517 U.S. at 965, 972, 973-74; *Miller,* 515 U.S. at 917. It does not look like a snake, bird or other animal. *See Cromartie II,* 532 U.S. at 240, 243; *Vera,* 517 U.S. at 973-74. Indeed, the legislature drew another congressional district with approximately the same shape that plaintiffs

do not challenge. Additionally, CD 28 satisfied the legislature's obligation to draw equipopulous districts.

As discussed earlier, the mere use of race as *a* reason for a redistricting decision cannot lead to a *Shaw* violation where that reason is not the dominant and controlling rationale, so that the legislature's redistricting is unexplainable on grounds other than race. *See Cromartie II*, 532 U.S. at 258. Here, despite some evidence of race-consciousness, there is abundant and uncontested evidence in the record that traditional districting principles were followed in establishing CD 28, and that such principles were not subordinated to racial concerns. In this connection, the evidence in the record shows that one important reason for the new district lines was to respond to requests by residents of the southern San Fernando Valley ("the Valley") to be included in the district of Rep. Berman. Congressman Berman had represented the southern (and largely white) parts of the Valley for decades as a member of the California Assembly and in Congress. The Special Masters in 1991 adopted a plan that abandoned the historical district configurations in the Valley, and substantially altered the district that Rep. Berman had long represented, by removing liberal white neighborhoods in the southern Valley and replacing those areas with predominantly Latino neighborhoods in the northeastern part of the Valley. The 2001 redistricting restored the southern Valley communities of Sherman Oaks, North Hollywood, and Studio City to Rep. Berman's district, and in exchange removed some of the Latino neighborhoods along its perimeter that had been added ten years earlier. The current redistricting plan thus modified the Special Masters' Plan by reestablishing, in

part, Rep. Berman's traditional district. It did so, moreover, in conformity with traditional districting principles; the legislature kept intact the bulk of the Special Masters' district, removed perimeter precincts in the north and west, and restored the southern tier of the district. In fact, CD 28 appears to conform to traditional districting principles to at least the same degree as the district created by the Special Masters and the alternative district proposed by plaintiffs.[23]

Plaintiffs challenge the proffered explanation for the lines of CD 28, noting that the original proposal for the district did not include the neighborhoods in the southern Valley that had been in Rep. Berman's district prior to the adoption of the Special Masters' Plan in 1991. It is undisputed, however, that legislative committees heard testimony from two homeowners' associations in these areas that advocated placing Sherman Oaks within Rep. Berman's district, and uniting the communities of Sherman Oaks and North Hollywood in a single district. Just as the map-drawers responded to MALDEF's initial complaints about the district, by moving the core of the Latino communities back within its boundaries, so too it appears the

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[23] The Special Masters appointed by the Supreme Court admittedly made districting decisions without regard to one of the most traditional of districting principles: politics. *Wilson,* 823 P.2d at 549 (noting, in adopting the Special Masters' plan, that the masters "excluded such political factors as the potential effects on incumbents or the major political parties."). The 2001 redistricting process, in contrast, was completed wholly by the so-called political branches, and the interests of partisan advantage and incumbency protection therefore assumed a major role. The final redistricting plan was passed by the votes of an overwhelming majority of the members of both political parties.

legislature responded to the concerns expressed by residents in areas formerly represented by Rep. Berman.

Plaintiffs contend that these communities could have been added to CD 28 without splitting Latino communities in the northern part of the district. As noted earlier, however, the fact that the legislature could have achieved its goal in a different way does not give rise to an inference that race predominated or that traditional districting criteria were subordinated to race. *Cromartie II,* 532 U.S. at 249 121 S.Ct. 1452; *see also id.* at 256-57 ("a showing that the legislature might have 'swapped' a handful of precincts out of a total of 154 precincts, involving a population of a few hundred out of a total population of about half a million, cannot significantly strengthen appellees' case."). Defendants' proffered explanation, in short, demonstrates that the district *is* explainable on a basis other than race.

The crux of plaintiffs' argument, and the crux of the debate surrounding CD 28 during the redistricting process, is the fact that the legislature's plan reduced the percentage of Latinos in the district. Latino advocacy groups wanted another majority-Latino district created, while the legislature originally proposed creating two Latino influence districts. The legislature, as previously noted, had no obligation to maximize the number of majority-Latino districts drawn. *See Shaw I*, 517 U.S. at 913; *Miller,* 515 U.S. at 924. *Cf. De Grandy,* 512 U.S. at 1017. Similarly, it had no obligation to maximize the number of Latinos placed in CD 28. As drawn, a majority of the district's population is Latino and very close to 50% of its voting age population is Latino.

Accepting plaintiffs' evidence as true, it cannot be said that it is more than the "modicum of evidence" the Court found insufficient in *Cromartie II*. 532 U.S. at 257. Most importantly, it does not raise a genuine issue of material fact regarding whether the legislature abandoned or subordinated traditional districting principles to racial considerations when it established CD 28. The legislature's adherence to such principles is fatal to plaintiffs' *Shaw* claim.

### D. Conclusion

The two districts that plaintiffs challenge under *Shaw* are not districts that foster "political apartheid;" to the contrary, they are remarkably diverse multi-racial and multi-ethnic districts. Thus, they are not districts that give rise to expressive or representational harms. Moreover, plaintiffs have failed to raise a material question of fact as to whether traditional districting principles were abandoned or subordinated to race, a necessary element of a *Shaw* claim. Accordingly, summary judgment is properly entered for defendants on plaintiffs' *Shaw* claims.

## II. Plaintiffs' Voting Rights Act Section 2 Claims (Non-Intentional)

Plaintiffs also bring traditional statutory vote dilution claims regarding CD 28 and SD 27 under Section 2 of the Voting Rights Act. To establish a traditional claim under section 2, plaintiffs need prove only that the creation of the challenged district has the "effect" of diluting the electoral power of minority voters. Intent is not an element. Plaintiffs argue that in CD 28 and SD 27 the new boundary lines have the effect of preventing Latinos from

electing candidates of choice. In both of the districts that plaintiffs challenge under this theory, Latinos constitute a plurality of the voting-age population. In both districts, substantial numbers of non-Latino voters have voted for Latino candidates – and Latino candidates have won elections in the areas in question with the assistance of white cross-over votes. Ultimately, we conclude that there is no material question of fact regarding the traditional § 2 claims: the record before us demonstrates beyond dispute that the districts as drawn by the legislature do not have the effect of denying Latino voters the ability to elect representatives of choice.

## A. Background

Section 2 prohibits the adoption of any election practice, including the drawing of district lines, that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[24] It has

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[24] Section 2 provides in full as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than

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been interpreted to bar the adoption of election districts that minimize or cancel out the voting power of minorities so that the minority group cannot elect representatives of choice. *Allen v. Bd. of Elections,* 393 U.S. 544, 555 (1969); *De Grandy,* 512 U.S. at 1012-13. This section of the Voting Rights Act is particularly unusual among civil rights laws because it requires no showing of discriminatory intent; it was amended in 1982 so as to provide for an "effects test" only. Prior to 1980, vote dilution cases were generally adjudicated using an effects standard first adopted in *White v. Regester,* 412 U.S. 755 (1973), as refined and further developed by the lower courts, particularly in *Zimmer v. McKeithen,* 485 F.2d 1297 (1973) (en banc), aff'd on other grounds sub. nom. *East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636 (1976) (per curiam). In 1980, a splintered Supreme Court decided City of *Mobile v. Bolden,* 446 U.S. 55 (1980). Although no single opinion garnered five votes, a majority of the Court agreed that plaintiffs in both constitutional and statutory vote dilution cases must prove discriminatory intent. Because civil rights organizations and others argued that it would be exceedingly difficult to prove minority vote dilution claims under an intent test, Congress amended the Voting

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other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population

42 U.S.C § 1973.

Rights Act to require only proof of discriminatory effects in order to establish liability under § 2. *See* Thomas M. Boyd and Steven J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History,* 40 WASH. & LEE L. REV. 1347 (1983).

The language of § 2 as amended does not give clear guidance to courts as to how to determine whether a voting practice results in the denial of a minority group's ability to elect its representative of choice; the statute merely directs that courts examine the totality of the circumstances. In light of the vague statutory language, the Supreme Court gave structure to the § 2 inquiry in *Thornburg v. Gingles,* 478 U.S. 30 (1986). In order to prevail on a vote dilution claim, the *Gingles* Court held, three "pre-conditions" must be met: First, the "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. That is, unless the minority group can establish that an effective majority-minority district can be created, a vote dilution claim is not cognizable because there is no minority voting power to dilute.[25] Second, "the minority group must show that it

[25] This first *Gingles* precondition has given rise to the question of whether a § 2 claim is cognizable when a legislature fails to create a feasible minority "influence district" – one in which the minority group constitutes a sufficiently large proportion of the district that it exerts a significant amount of influence on the elected representative. The Supreme Court has repeatedly declined to decide this question. *De Grandy,* 512 U.S. at 1009; *Voinovich v. Quilter,* 507 U.S. 146, 152 (1993). Most, but not all, lower courts have generally rejected influence district claims under § 2. *See Latino Political Action Committee v. Boston,* 784 F.2d 409 (1st Cir. 1986); *Hastert v. State Bd. of Elections,* 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court); *but see Armour v. Ohio,* 895 F.2d

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is politically cohesive." *Id.* at 51. As the Court explained in *Gingles,* unless members of a minority group have shared political views, "it cannot be said that the selection of a[n] . . . electoral structure thwarts distinctive minority group interests." *Id.* Third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Id.* Of course, if minority-preferred candidates actually win elections, then the minority is able to elect representatives of its choice.

*Gingles*, like most of the voting rights cases to arise in the first two decades after the enactment of the Voting Rights Act, challenged the use of multi-member districts that effectively subordinated the electoral power of the minority voting population to that of the majority through the conduct of at-large elections in which it was impossible for a minority-preferred candidate to be elected.[26] Although the three *Gingles* factors were devised in cases challenging multi-member districting, the Supreme Court held in *Growe v. Emison*, 507 U.S. 25, 40-41 (1993), that the *Gingles* analysis applies equally to vote dilution claims involving single-member districts. We therefore apply the *Gingles* test in this case.

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1078 (6th Cir. 1990), vacated on other grounds en banc, 925 F.2d 987 (6th Cir. 1991). No such claim is asserted here, and we therefore do not consider the question. Specifically, we do not consider whether the intentional dilution of a minority group's *influence* in a district can, without more, give rise to a cognizable claim. *See infra,* Section III, Intentional Dilution Claims.

[26] In the jargon of redistricting law, such claims are typically referred to as "submergence" claims. *De Grandy,* 512 U.S. at 1012-13.

In *Johnson v. De Grandy,* 512 U.S. 997 (1994), the Supreme Court further explained the method of analyzing cases that allege vote dilution through the gerrymandering of single-member districts. In *De Grandy,* the Court held that vote dilution under § 2 is not automatically established even if all three *Gingles* pre-conditions are established. Because the statute requires a court to examine the "totality of the circumstances," the *De Grandy* Court held that although the *Gingles* factors are necessary to prove a § 2 violation, they are not sufficient: when the three *Gingles* pre-conditions are met, a court evaluating a § 2 claim must then assess the totality of the circumstances to determine if the "effects" test is met – that is, if minority voters' political power is truly diluted. *Id.* at 1013 ("[F]actfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution."); *see Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist.*, 56 F.3d 904, 911-12 (8th Cir. 1995) (assuming satisfaction of the *Gingles* factors, but affirming a finding of no minority vote dilution based on the totality of the circumstances).[27]

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[27] Chief among the circumstances that the *De Grandy* Court held to be relevant to the § 2 inquiry are those listed in the Senate Judiciary Committee Report regarding the 1982 Amendments to § 2. S. REP. NO. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07. Those factors, frequently called the "Senate factors" or the "*Zimmer* factors," owing to their origin in *Zimmer v. McKeithen,* 485 F.2d 1297 (1973) (en banc), are set forth below:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

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With these legal principles in mind, we turn to plaintiffs' traditional § 2 claims respecting CD 28 and SD 27. We resolve both on the basis of the absence of a necessary *Gingles* pre-condition, pre-condition three, and thus do not reach the totality of the circumstances test.

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(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction;

(8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

(9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

1982 U.S.C.C.A.N. at 206-07.

B. Senate District 27

Senate District 27 is located in southeast Los Angeles County, and includes the communities of Downey, Paramount, Cerritos, Artesia, Hawaiian Gardens, Signal Hill, Lakewood, and Lynwood, as well as parts of Long Beach and South Gate. The seat is currently held by Sen. Betty Karnette, who was first elected in 1990. Plaintiffs do not dispute that Sen. Karnette was the Latino candidate of choice; although herself white, she received the majority of Latino support within the district during the 1990 primary election, in which there was no incumbent Senator. It is also undisputed that Sen. Karnette voted in accordance with the Senate Latino caucus 95% of the time in the 1997-98 session, and 85% in the 1998-99 session. Due to the limits on state legislative terms in California, Sen. Karnette will be unable to run for re-election in 2004.

The essence of plaintiffs' traditional § 2 claim regarding Senate District 27 is that the redistricting statute packs Latinos into neighboring Senate District 30, a majority-Latino district, and that the challenged district could and should have been drawn as an additional majority-Latino seat. Latinos constitute a plurality of the voting-age population ("VAP") in SD 27: 40% of the VAP is Latino, 36% is white, 12% is Asian and 9% is black. In SD 30, Latinos constitute the overwhelming majority of the district: 76% of the total population and 71% of the VAP is Latino. Although it is undoubtedly true that the legislature could have moved some Latino voters from the Latino-dominated SD 30 to SD 27 in order to construct an additional majority-minority district, we conclude that the Voting Rights Act did not require it to do so. Because the undisputed facts reflect that the non-Latino voters in SD

27 have demonstrated a willingness to vote for Latino-preferred candidates, and because plaintiffs have failed to present evidence that Latino-preferred candidates are regularly defeated as a consequence of the voting patterns of a non-Latino bloc of voters, we conclude that the manner in which the legislature configured SD 27 does not prevent Latino voters from electing a representative of choice. In short, plaintiffs have failed to create a question of material fact regarding the existence of *Gingles* pre-condition three.

1. *Gingles* Pre-Condition One: Majority-Minority District

The analysis of the first *Gingles* pre-condition in this case is complicated by the unavailability of citizen voting age population ("CVAP") data. The Ninth Circuit, along with every other circuit to consider the issue, has held that CVAP is the appropriate measure to use in determining whether an additional effective majority-minority district can be created. *Romero v. City of Pomona,* 883 F.2d 1418, 1426 (9th Cir. 1988), abrogated on other grounds, *Townsend v. Holman Consulting Co.,* 914 F.2d 1136, 1141 (9th Cir. 1990) (en banc); *Negron v. City of Miami Beach,* 113 F.3d 1563, 1569 (11th Cir. 1997); *Campos v. City of Houston,* 113 F.3d 544, 548 (5th Cir. 1997). The *Romero* court explained that the purpose of the first *Gingles* pre-condition is to determine whether minority voters have the *potential* to form an effective majority district; because non-citizens cannot register to vote, *Romero* concluded that they should not be included in the figures used to determine whether an additional district can be drawn in which the minority group would have sufficient voting

power to elect an additional representative of choice. 883 F.2d at 1426.

Here, the CVAP data at the district and precinct level has not yet been released by the Census Bureau; the only CVAP data available is statewide. That data discloses only that approximately 17% of the *statewide* CVAP is Latino. Plaintiffs' expert witness, Dr. Kousser, has testified that extrapolating from this number to the CVAP percentage at the local precinct or district level is unreliable.

The Supreme Court has to date declined to endorse any one method of proving that a district is one in which a minority group has the "ability to elect" a representative of choice. *Gingles,* 478 U.S. at 46, n. 12. The question, therefore, is whether, because CVAP figures are not available, plaintiffs may rely on another measure, such as VAP, to establish *Gingles* pre-condition one. Courts have, in some circumstances, employed such alternate measures. *See, e.g., Old Person v. Cooney,* 230 F.3d 1113, 1121 (9th Cir. 2000) (noting that parties did not dispute *Gingles* pre-condition one figures based on Native American voting age population); *see also De Grandy,* 512 U.S. at 1014, 1021, n. 18, (noting that citizen voting age population figures were not available at the time of trial, and using voting age population figures to assess proportionality).

Plaintiffs have submitted a plan for a district containing a Latino population of 70.92%, and a Latino VAP of 66.95%, and defendants do not dispute that such a district could be drawn. We conclude that, in light of the unavailability of the CVAP data, the ability to construct a district that is so substantially Latino both in overall population and in VAP is sufficient to raise a genuine issue of material fact as to the first *Gingles* pre-condition. In constructing remedial districts, courts frequently conclude

that a super-majority of the relevant minority group is required to ensure that the group will constitute an effective voting majority within the district. *See Ketchum v. Byrne,* 740 F.2d 1398, 1413, 1415-16 (7th Cir. 1984) (in remanding for reconsideration of the appropriate remedial districting plan, the court noted that "[a] guideline of 65% of total population has been adopted and maintained for years by the Department of Justice and by reapportionment experts and has been specifically approved by the Supreme Court in circumstances comparable to those before us as representing the proportion of minority population reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice."); *see also African-American Voting Rights Legal Defense Fund v. Villa,* 54 F.3d 1345, 1348 n.4 (8th Cir. 1995) ("We conclude that either 60% of the voting age population or 65% of the total population is reasonably sufficient to provide black voters with an effective majority."). We need not determine whether plaintiffs' figures, if established at trial, would be sufficient to meet the requirements of *Gingles* pre-condition one. It is sufficient for present purposes to find that plaintiffs have raised a triable issue of fact regarding the issue.[28]

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[28] Although we conclude that a question of material fact exists with respect to *Gingles* pre-condition one, we do not rest that conclusion on Dr. Kousser's analysis. We note that Dr. Kousser's opinion is based on Democratic Party registration figures, a measure that is unprecedented in redistricting law and that raises difficult analytical questions, particularly in view of the existence of a number of Latino Republican office-holders in California, and of recent efforts by the California Republican Party to increase its share of the Latino vote and registration. We need not determine the validity of Dr. Kousser's approach here because a question of material fact exists for other, unrelated reasons.

2. *Gingles* Pre-Condition Two: Racial Cohesion

There is little dispute that Latinos in SD 27 vote cohesively. Indeed, defendants essentially concede the point for summary judgment purposes. The evidence in the record is overwhelming that Latinos in Los Angeles County vote monolithically for Latino candidates, regardless of the ideology of that candidate. For instance, in 2001, 97% Latinos citywide voted for Los Angeles Mayoral candidate Antonio Villaraigosa, a liberal Latino Democrat; an almost identical percentage voted for Los Angeles City Attorney candidate Rocky Delgadillo, a far more conservative Latino who was running against a liberal white candidate. Plaintiffs' data further shows that in the two Assembly Districts that constitute a substantial portion of SD 27, more than 90% of Latino voters supported Latino candidates in recent elections for the state assembly. At the very least, therefore, a question of material fact exists with respect to *Gingles* pre-condition two.

3. *Gingles* Pre-condition Three: Majority Bloc Voting

It is with respect to the third *Gingles* pre-condition that plaintiffs' evidence fails to establish the existence of a question of material fact. Put simply, SD 27 is a district in which Latino candidates and other candidates preferred by Latino voters can win. Consequently, it is not a district in which "minority and majority voters prefer different candidates [and] the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Gingles*, 478 U.S. at 48. Such an exercise of negative voting power by the white majority is what the *Gingles* Court called the "theoretical basis" for a vote

dilution injury, and it is wholly absent here. It is insufficient for purposes of a vote dilution claim merely to show that the minority group votes cohesively. Plaintiffs must also show that the cohesive minority preference is regularly defeated by a majority bloc that refuses to vote for the minority preferred candidate. *Id.* at 51. Plaintiffs have proffered no proof on the latter point with respect to SD 27.

No election has yet been conducted in the precise set of precincts that now constitutes SD 27; accordingly, to understand the voting behavior of the electorate in that district, we must resort to the examination of exogenous elections, including the results in parts of overlapping districts. *Citizens for a Better Gretna v. Gretna*, 834 F.2d 496, 502-03 (5th Cir. 1987) (approving the use of exogenous elections in a *Gingles* pre-condition three analysis, and noting that *Gingles* "suggests flexibility in the face of sparse data."); *Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1371-73 (N.D. Ga. 2001) (examining both endogenous and exogenous elections as part of *Gingles* pre-condition three analysis).[29]

There is much data in the record concerning past voting patterns. We believe that by far the most probative evidence is that relating to the non-Latino voters' willingness to support Latino candidates for office. Evidence that,

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[29] In the abstruse language of redistricting, the term "endogenous elections" refers to elections for the particular office and district that is at issue. "Exogenous elections" are those held for other offices conducted in the same approximate geographic area. *Clay v. City of St. Louis*, 90 F.3d 1357, 1360 n. 6 (8th Cir. 1996).

when given a choice between two white candidates, Latinos and non-Latinos frequently make the same choice is less probative of *Gingles* pre-condition three. This is so for two reasons. Most important, any racial hostility on the part of non-Latino voters towards Latinos is unlikely to have a significant manifestation in elections in which none of the major candidates is Latino. Also, the record reflects that in California, nearly two-thirds of Latinos enroll in the Democratic Party, which is the majority party in the state. Accordingly, when Latinos are placed in a district containing a majority of Democrats, as in SD 27 and CD 28, the general election results are ordinarily not at all probative of whether there are meaningful differences between the preferences of Latino and white voters. We therefore agree with the Ninth Circuit's observation that if *Gingles* pre-condition three could be defeated on a showing that the preferred white candidates of minority groups regularly won elections, the protections of the Voting Rights Act would be substantially weakened. Such a rule would "doom any Section 2 claim in which white candidates, acceptable to minorities and non-minorities alike, are regularly elected, but in which minority candidates, preferred by minorities but unfavored by whites, are consistently defeated." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 544 (9th Cir. 1998). This is the view not only of the Ninth Circuit but of several others as well.[30]

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[30] See *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (while not foreclosing consideration of races involving only white candidates, the court stated that "the most probative evidence of whether minority voters have an equal opportunity to elect candidates of their choice is derived from elections involving black candidates. Certainly, where only white candidates are competing for office in a particular jurisdiction, it

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Every set of election returns presented by either party demonstrates that Latinos win elections, aided by substantial white cross-over voting, in the areas comprising SD 27. For instance, the evidence submitted by plaintiffs' expert shows that in the two Assembly districts that constitute a substantial portion of SD 27, Latino candidates received large numbers of white votes. In the 50th Assembly District, according to Dr. Kousser's report, 57% and 59% of whites voted for the Latino Assembly candidate in the 2000 primary and general elections respectively. In AD 56, "less than 50% of the Anglo vote" – but evidently a still-substantial percentage – went to the

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is 'virtually unavoidable that certain white candidates would be supported by a large percentage of . . . black voters.' . . . Such elections, however, may reveal little about the issue to be determined: the capacity for white bloc voting usually to defeat black candidates of choice. Particularly where voting is extremely polarized by race in elections in which black candidates participate, white-on-white elections in which a small majority (or a plurality) of black voters prefer the winning candidate seem comparatively less important.") (quoting *Citizens for a Better Gretna*, 834 F.2d at 502); *Jenkins v. Red Clay Consolidated School District Board of Education*, 4 F.3d 1103, 1128-29 (3d Cir. 1993) (noting that "white versus white elections tend to be less probative," the court stated that "[i]n deciding which, if any, of the white candidates were minority-preferred, the court must engage in a detailed, practical evaluation of the extent to which any particular white candidate was, as a realistic matter, the minority voters' representative of choice."); *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) ("This court has consistently held that elections between white candidates are generally less probative in examining the success of minority-preferred candidates, generally on grounds that such elections do not provide minority voters with the choice of a minority candidate."), cert. denied, 510 U.S. 1071 (1994); *Westwego Citizens for Better Government v. Westwego*, 872 F.2d 1201, 1208, n. 7 (5th Cir. 1989) ("the evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates.").

Latino candidate for that post. Moreover, *Latino candidates won both elections.*[31] In addition, defendants have put forward uncontradicted evidence that Latino candidates have in fact won the sets of precincts in the two Assembly districts that overlap with SD 27. For instance, in the 2000 general election for AD 56, Latina Assembly Member Sally Havice won 59% of the vote in the portion of her district that is contained within SD 27. The overlapping area has a *lesser* percentage of Latino voters than does SD 27 as a whole: SD 27 has a 45.1% Latino population and 39.8% VAP, whereas the area contained in both SD 27 and AD 56 is 37.2% Latino overall, and includes a Latino VAP of 33.2%. Defendants also cite evidence that Latino candidates for statewide office, such as Lieutenant Governor Cruz Bustamante, and Insurance Commissioner candidate Diane Martinez win the heavily Democratic area that is SD 27. We do not find such data particularly helpful in assessing the racial attitudes of the district's voters, in part for the same reasons we find the success of Latino-preferred white candidates only marginally probative.[32] Additionally, we prefer to analyze the local elections more closely because the campaigns are necessarily more

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[31] Dr. Kousser's figures totally ignore the black and Asian vote. It is reasonable to assume that at least some of these voters supported the Latino candidates as well. However, because we must draw all reasonable inferences in plaintiffs' favor, we will assume for purposes of this opinion that the black and Asian communities voted for Latino candidates in no greater proportion than white voters.

[32] Defendants offer similar evidence that we also find of little probative value regarding statewide races in which only white candidates ran, i.e., past races won by Senators Barbara Boxer and Diane Feinstein, as well as Vice President Gore's 2000 presidential run.

personalized and racial attitudes are therefore more relevant. *See Gingles,* 478 U.S. at 59.

What is most striking about the evidence with respect to SD 27 is that plaintiffs have not identified a single election in any territory that forms a part of the district in which a Latino candidate or a Latino-preferred candidate has *ever* been defeated, by a non-Latino bloc vote or otherwise. Indeed, plaintiffs' expert does not even address the results of actual candidate elections either statewide or in the district. Thus, the only evidence in the record regarding elections in SD 27 concerns elections in which the Latino-preferred candidates – many of whom were in fact Latinos – were victorious.

This case contrasts starkly with cases in which courts have concluded that plaintiffs satisfied the third pre-condition of *Gingles.* There need not be a "virtually complete absence of [minority] elected officials" in order to create a material question of fact regarding *Gingles* pre-condition three. *Clark v. Calhoun Cty.,* 88 F.3d 1393, 1398 (5th Cir. 1996). Thus, the election of *some* minority-preferred candidates will not necessarily defeat a claim on summary judgment. *Id.* at 1397. *See also National Association for the Advancement of Colored People, Inc. v. City of Niagara Falls, New York,* 65 F.3d 1002, 1009 (2d Cir. 1995) ("the election of one black candidate does not preclude the plaintiffs from establishing vote dilution."). To create a triable issue with respect to *Gingles* pre-condition three, a plaintiff must show that, at least under some circumstances, minority-preferred candidates are defeated

by the votes of a bloc of non-minority voters. There is no such showing here.[33]

Plaintiffs argue that *Gingles* pre-conditions two and three "merge," and that they may therefore prevail so long as they demonstrate that the electorate is "racially polarized." This contention finds no support in the law, and is directly contrary to the "theoretical basis" of § 2 as explained in *Gingles,* 478 U.S. at 48.[34] Plaintiffs' evidence

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[33] We need not consider the question of how to apply *Gingles* pre-condition three when no minority candidates have ever sought office in the area that is in dispute. In the areas that comprise SD 27 and CD 28 respectively, there is a sufficient record of how voters behave when Latino candidates are on the ballot.

[34] Some courts have noted that *Gingles* pre-conditions two and three are logically related in that they both *may* be proven by a showing of racially polarized voting. Nevertheless, those courts have not suggested that a showing of racial polarization in voting excuses a plaintiff from satisfying each of the three pre-conditions. "Evidence of racially polarized voting is the linchpin of a section 2 vote dilution claim, and is relevant to establishing two of the three elements set forth in the *Gingles* decision – the political cohesiveness of the minority group and the ability of the white majority usually to defeat the minority's preferred candidate." *Westwego Citizens for Better Government v. Westwego,* 946 F.2d 1109, 1118 (5th Cir. 1991). Whether such polarization is sufficient to satisfy pre-condition three will depend, however, on the percentages of voters in the majority and minority groups, and the degree of polarization. Plaintiffs rely on the statement in *Ruiz,* 160 F.3d at 551, that "[r]acially polarized voting, one of the most important Senate factors, is the combined effect of the second and third *Gingles* preconditions (minority political cohesion and majority bloc voting"). Nothing in this observation, however, suggests that the second and third *Gingles* pre-conditions need not be proved separately. Indeed, a careful reading of *Gingles* reveals that the two are distinct inquiries. See *Gingles,* 478 U.S. at 56 ("The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to

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does show that Latinos prefer Latino candidates in far higher proportions than do non-Latinos; but it also shows that substantial numbers of non-Latinos support Latino candidates, with the result that the Latino candidates actually win elections. Thus, the evidence of racial polarization is insufficient as a matter of law to establish the "effects" required in a vote dilution case.

Plaintiffs offer two arguments with respect to *Gingles* pre-condition three in lieu of direct evidence that minority-preferred candidates are regularly defeated by a hostile voting bloc. Neither creates a question of material fact with respect to the third pre-condition. First, plaintiffs argue that the findings of fact in *Garza v. County of Los Angeles,* 756 F. Supp. 1298 (C.D.Cal.1990), virtually assure a trial regarding *Gingles* pre-condition three. In *Garza,* the court found that racially polarized voting was prevalent in Los Angles County, and that the Los Angeles County Board of Supervisors intentionally discriminated against Latinos by drawing the boundary lines of the five county supervisorial districts so that Latinos could not win any of them. Plaintiffs ask us to rely on the *Garza* findings of fact to support an inference of discrimination here. That

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defeat the minority's preferred candidates."). To determine whether racially polarized voting is "legally significant," the court must make "discrete inquiries into minority and white voting practices." *Id.* Dr. Kousser's conclusion that there is racially polarized voting in the area encompassed within SD 27 focuses exclusively on the relative percentage of Latino and white voters who chose the Latino candidate. It does not address whether the percentage of white (or non-Latino) voters who voted against that candidate was sufficient to defeat him or her. Consequently, to the extent Dr. Kousser concludes that there is "racially polarized" voting in the district, it is not the type of "legally significant" polarization about which *Gingles* speaks.

case, which is twelve years old and relates to events that occurred even earlier, cannot, in view of the evidence submitted by the parties, be the basis for a finding that at the present time, the bloc voting of non-Latinos regularly results in the defeat of Latino candidates, in Los Angeles County generally, or in SD 27 in particular. Although the existence of historical discrimination is a factor in the "totality of the circumstances" analysis conducted after the three *Gingles* pre-conditions are met, given the evidence actually before us, the *Garza* findings shed little light on whether the voters of SD 27 presently vote as a bloc against Latino candidates. The only evidence in the record that is probative of this issue is the outcome of recent elections in the area that comprise SD 27. That data reveals a non-Latino electorate that is willing to and does vote for Latino candidates in sufficient numbers to elect Latinos to office.

We also note that this is a very different case from *Garza* for other reasons. For instance, in *Garza* the primary allegation was that non-Latino public officials manipulated the political process to shut Latinos out of elective county office entirely, a situation that was perpetuated by the all-white Board of Supervisors' control of the redistricting process. Here, the allegations relate to the districting decisions of the state legislature. In this regard, the objective evidence is quite different: Latinos constitute 22% of that legislature, even though they represent just 17% of the state's CVAP; Latinos were members of the Senate and Assembly redistricting committees that sponsored the redistricting legislation at

issue here; and 23 of 26 Latino legislators supported the redistricting statute, including every Latino State Senator.[35] In contrast to the situation in *Garza,* it is impossible to conclude here that Latinos were shut out of the redistricting process that followed the 2000 census, or that an objective of that process was to exclude Latinos from elective state office.

It is certainly not our view that racial discrimination no longer affects our political institutions or motivates any portion of the electorate of Los Angeles County. Still, the election returns offered by both sets of litigants reveal that in Los Angeles County, whites and other non-Latinos are currently far more willing to support Latino candidates for office than in the past. In short, at the outset of the 21st century, the data in the record before us paints a far more encouraging picture of racial voting attitudes than did the data in *Garza*.

Second, plaintiffs argue that their expert's analysis creates a question of material fact regarding *Gingles* precondition three. Dr. Kousser, a highly-experienced and respected political scientist, who is a nationally recognized

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[35] Another important change since the time of *Garza* is a demographic one: the number of Latinos in Los Angeles County is growing rapidly. Over the course of the 1990's, the Latino population in Los Angeles County increased by 34%, in contrast to the county population as a whole, which grew by 11.5%. During that time, the white population declined both in percentage and absolute numbers. *See* Los Angeles County Demographic Profile, available at http://planning.co. la.ca. us/rsrch_LACountyProfile.pdf (last visited May 29, 2002). The only inference that can be drawn from the demographic data is that Latinos are, as a practical matter, a far more formidable political force than they were in the 1980's.

expert in voting behavior, has offered a somewhat unconventional measure of a district in which Latino candidates can win elections. After canvassing the results of state legislative elections throughout California, he opines that a district in which Latinos can elect a candidate of choice is one in which they constitute more than 40% of the Democratic Party's registered voters. In a paper submitted to the Legislature as part of MALDEF's lobbying efforts during the 2001 redistricting process,[36] Dr. Kousser concluded that Latinos have a realistic chance of electing representatives of choice if they constitute at least 30% of the Democratic registration, and an excellent chance once they constitute 40% of the Democratic registration. Under Dr. Kousser's theory, a Latino candidate is unlikely to win a district with the demographics of SD 27.

Plaintiffs argue that it is possible to extrapolate from Dr. Kousser's statewide study of voter behavior the conclusion that a non-Latino bloc in SD 27 will not vote for Latino candidates of choice, and those candidates of choice will therefore be defeated. Dr. Kousser's report, at least as it applies to the *Gingles* pre-condition three inquiry, does not raise a triable issue of fact. *Gingles* states that the "inquiry into the existence of vote dilution caused by

[36] As noted earlier, MALDEF is counsel to plaintiffs in this case. We do not consider pre-litigation positions taken by MALDEF to bind plaintiffs in this matter under an estoppel theory or otherwise. MALDEF was a leading participant in the redistricting period, however, and Dr. Kousser worked with it, applying the theories he now offers as an expert witness in this case. Accordingly, some of MALDEF's submissions to the legislature may be relevant evidence, not because they constitute plaintiffs' position in this litigation, but because they reflect the opinion of MALDEF's expert on the issues presented by this case.

submergence in a multimember district is district specific." 478 U.S. at 59. The same holds true for vote dilution claims that allege cracking or packing in single-member districts. *Magnolia Bar Ass'n v. Lee,* 994 F.2d 1143, 1151 (5th Cir. 1993) (affirming district court grant of summary judgment for defendants on *Gingles* pre-condition three because plaintiffs could not prove white bloc voting in a particular district by the use of statewide statistics). Unlike the local data, Dr. Kousser's statewide data does not directly bear on the attitude of non-Latino voters in the disputed area.

In a state that is as diverse as California in every way, including geographically, a statewide analysis is particularly unpersuasive. California's diversity is substantial and significant. The voting behavior of residents in the technological centers near the San Francisco Bay area, the agricultural region of the Central Valley, the border communities adjacent to Mexico, or the desert regions in the eastern part of the state is far less helpful in predicting the voting patterns of urban, cosmopolitan Angelenos than data from Los Angeles County itself. Dr. Kousser's report does not explain how his analysis regarding what may constitute an effective Latino district in Berkeley, Barstow or Bakersfield reliably predicts voting behavior in Los Angeles County. Given the results of elections that were actually conducted in the territory that makes up the challenged districts – which results show that non-Latinos do not vote as a bloc to defeat Latino candidates – Dr. Kousser's contrary extrapolations from statewide data do not create a genuine issue of fact regarding *Gingles* factor three.

Nor does Dr. Kousser's analysis of the voting patterns in SD 27 with respect to Propositions 187 (denying state

services to undocumented immigrants), 209 (prohibiting public agencies in the State of California from adopting affirmative action policies) and 227 (barring the use of bilingual education in California public schools) raise a triable issue of fact.[37] All three of the measures were opposed by a substantial majority of the Latino voting population. While Dr. Kousser opines that the propositions polarized the electorate in SD 27, the data he provides does not support his conclusion. First, the data Dr. Kousser provides concerns MALDEF's proposed SD 27, not SD 27 as it was drawn by the legislature. Second, it demonstrates that the measures did not produce a consistent non-Latino voting bloc in the areas now included within the district. Dr. Kousser's charts regarding Proposition 187 show that the average overall percentage of individuals voting for the measure in the areas he studied was approximately 55%. In these same areas, however, Proposition 209 was defeated, with the average overall percentage voting in favor of the measure being 35.2%. Proposition 227 also appears to have lost in the districts Dr. Kousser examined, with the overall percentage of

[37] We assume for purposes of this opinion that the results in ballot measure elections may be used to show that Latino voters' desires are regularly rejected as a result of the cohesive vote of the non-Latino majority. We express no view, however, on the underlying question of the relevancy of such data. To the extent that plaintiffs may be suggesting that if an individual voted "yes" on the three propositions, he must necessarily be hostile to Latino interests and unlikely to vote for Latino candidates, we are unwilling to adopt such a generalization. It may be reasonable, however, to assume that if a voter voted "no" on the propositions, then he is probably not unreceptive to the candidacy of a Latino.

voters who favored the measure being 47.7%. As respects the latter two propositions, therefore, it appears that the position favored by a majority of Latino voters prevailed. Since Latinos represent no greater than 30% of any of the districts studied, the fact that the measures were defeated reflects substantial cross-over voting by non-Latino constituencies.

Putting aside the fact that the data does not relate to SD 27 as drawn by the legislature, it shows, at best, that Latinos' preferred position was defeated in one election – that regarding Proposition 187. As noted earlier, voting rights plaintiffs cannot prevail by demonstrating that the minority group's candidate or issue of choice was defeated in a single election. *Gingles,* 478 U.S. at 57; *City of Niagara Falls,* 65 F.3d at 1009. Consequently, Dr. Kousser's data regarding state ballot measures also fails to raise a triable issue of fact regarding *Gingles* pre-condition three.

In light of the fact that the record before us reflects that Latino candidates in the area of SD 27 are not ever – much less regularly – defeated by an anti-Latino bloc vote, we conclude that the district as configured by the legislature does not violate § 2 of the Voting Rights Act.[38] Latinos enjoy plurality status in SD 27. Whether it would have been preferable for the legislature to draw another district such as SD 30, in which Latinos are assured of electing a Latino candidate, or to construct a district such as SD 27, in which Latinos will undoubtedly exert strong influence

[38] Our conclusion is limited to the traditional vote dilution claim discussed in this Section. It is not intended to resolve the intentional vote dilution claim which we consider in Section III, *infra.*

on whoever the office-holder may be, is an interesting question of politics and political theory. However, because plaintiffs' challenge to SD 27 as presently drawn fails to meet *Gingles* pre-condition three, the legislature's choice must be upheld.

C. Congressional District 28

Plaintiffs also bring a traditional § 2 vote dilution claim regarding CD 28. As discussed *supra,* in the context of plaintiffs' racial gerrymandering claims, CD 28 is a diverse San Fernando Valley district in which Latinos constitute a plurality of the total population and the VAP. It, like SD 27, is located in Los Angeles County, and thus much of our discussion with respect to SD 27 is pertinent here as well.

1. *Gingles* Pre-Conditions 1 and 2

We need not address the first two *Gingles* pre-conditions at length. For the same reasons that plaintiffs have created a question of material fact with respect to the first two-preconditions [sic] in the case of SD 27, they have unquestionably done so with respect to CD 28. First, the fact that the district plaintiffs propose is 66.99% Latino with a 61.77% Latino VAP raises a triable issue of fact as to whether it would be an effective Latino majority district. Second, there can be no doubt that as to *Gingles* pre-condition two, the cohesion of the Latino vote, plaintiffs have similarly raised a triable question of fact. As noted above, county-wide Latinos vote for Latino candidates at rates well exceeding 90%. Moreover, in the two Los Angeles City Council Districts that comprise a substantial part of CD 28, Dr. Kousser reports that in 2001, nearly 98% of

Latinos voted for the liberal Latino candidate for mayor, and 94% of Latinos voted for the more conservative Latino candidate for city attorney.

2. *Gingles* Pre-Condition 3

As with SD 27, however, plaintiffs fail to offer evidence that raises a question of material fact regarding the third *Gingles* pre-condition. Like SD 27, the undisputed factual record shows that Latinos [sic] candidates can and do win elections in the territory that constitutes CD 28. Here, unlike in SD 27, plaintiffs do point to one endogenous election in which a Latino-preferred candidate was defeated: in a primary election in 1998, the Latino mayor of the City of San Fernando, Raul Godinez, challenged long-term incumbent Rep. Howard Berman in a Democratic primary election. Berman won approximately two-thirds of the vote, and the vote was undoubtedly polarized: three of four Latinos voted for Godinez, while nine of ten whites voted for Berman.[39] The election, however, does not

[39] We note that the percentage of Latinos voting for Godinez is significantly lower than the percentage voting for other Latino candidates, which is regularly well above 90%. We have no doubt that this is so at least in part because Rep. Berman has a well-documented record of support for the interests of Latino communities and has historically championed Latino causes both as a state and a federal legislator. *See, e.g.*, Aff. of Dolores C. Huerta, First Vice-President *Emeritus* of the United Farm Workers Union ("Congressman Howard Berman has always been one of our most effective political supporters.... [W]hen then-Assemblyman Berman authored and worked to pass the Agricultural Labor Relations Act, which provided farm workers with the right to collectively bargain and organize, there were very few farm workers or Latino voters in his district."). Congressman Berman has received MALDEF's Annual Legal Award for being a "leader in the fight to oppose the creation of a new foreign agricultural guest worker"

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raise a triable issue of fact as to whether Latino-preferred candidates are regularly defeated by a non-Latino voting bloc. Even taking every reasonable inference in plaintiffs' favor, we cannot say that this single election – in which a better-funded, popular, well-known and highly effective incumbent defeated a novice primary challenger whose political base was the tiny City of San Fernando – creates a question of fact regarding *Gingles* pre-condition three in light of the uncontradicted evidence regarding other elections set forth below.[40] *See Gingles,* 478 U.S. at 57 ("Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, . . . a pattern of racial bloc voting that extends over a

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program, and an Annual Congressional Award from the National Council of La Raza in recognition of his "support of public policies benefitting the Hispanic Community." Moreover, when the district contained the Latino voters whose removal plaintiffs challenge, Berman was so popular that in the last elections, in 2000, he had no opponent in the Democratic primary, and no major-party opponent in the general election.

[40] As defense counsel noted, paraphrasing Aristotle's well-known and much-quoted aphorism, "[O]ne swallow does not make a summer, nor does one day." 1 NICHOMACHEAN ETHICS 1098, *in* COMPLETE WORKS OF ARISTOTLE, trans. by W.D. Ross, ed. Jonathan Barnes, Princeton University Press (1984). *See, e.g., United States v. Virginia,* 518 U.S. 515, 561 (1996) (Rehnquist, C.J., concurring); *Commissioner v. Wodehouse,* 337 U.S. 369, 415 (1949) (Frankfurter, J., dissenting). *See also Uno v. City of Holyoke,* 72 F.3d 973, 985 (1st Cir. 1995) ("the results of a single election are unlikely, without more, to prove the existence or nonexistence of embedded racial cleavages. Thus, race-conscious politics (or its absence, for that matter) can more readily be seen by producing a documentary that spans a series of elections than by taking an isolated snapshot of a single election. After all, to be legally significant, racially polarized voting in a specific community must be such that, over a period of years, whites vote sufficiently as a bloc to defeat minority candidates most of the time.").

period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election.").

With the exception of the Berman-Godinez primary, all of the record evidence demonstrates that a substantial number of white voters in the San Fernando Valley are willing to support Latino and Latino-preferred candidates, and that white-bloc voting does not result in the regular defeat of Latino or Latino-preferred candidates. Indeed, such evidence is more plentiful than that related to SD 27.[41] Most telling are the results of the 2001 City of Los Angeles mayoral and city attorney elections.[42] In the general election for city attorney, the Latino candidate, Rocky Delgadillo received 44.7% of the non-Latino vote

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[41] In addition to the elections discussed in the text, defendants also present evidence regarding the success of Latino candidates for statewide office within CD 28. Specifically, they cite the fact that Lieutenant Governor Cruz Bustamante won both the 1998 primary and general elections within the district, that unsuccessful Insurance Commissioner candidate Diane Martinez won the district in her 1998 primary race, and that Art Torres won the district in his 1994 general election race for Insurance Commissioner, after losing in the area in the primary. For the reasons stated earlier, we find such evidence only marginally relevant in assessing voter attitudes within CD 28. To the extent relevant, however, it demonstrates that Latino candidates are not routinely defeated in the precincts that comprise CD 28.

[42] Ninety-six and one-third percent of CD 28 is within the City of Los Angeles. The remainder of the district is the City of San Fernando, which is predominantly Latino; 87% of the VAP in San Fernando is Latino. Thus, the only reasonable inference based on plaintiffs' racial cohesion statistics is that a Latino candidate would fare better in the district as a whole than he did in the Los Angeles portions of the district. And, as noted in the text, Latino candidates win elections against white opponents even in the Los Angeles portions of the district.

and 93.5% of the Latino vote in the two Los Angeles City Council Districts that constitute a substantial portion of CD 28. With the assistance of white cross-over votes, Delgadillo won the precise area that now comprises CD 28, 52% to 48%, even though the other candidate, who was white, was the incumbent Los Angeles City Councilmember for portions of the district.[43] In the general election for mayor, the Latino candidate, Antonio Villaraigosa, won 30.5% of the non-Latino vote in addition to 97.5% of the Latino vote in the two overlapping city council districts. More important, Villaraigosa handily defeated his opponent, also a white candidate, and an incumbent city-wide officeholder, in the precincts that now constitute CD 28: 54.7% to 45.3%.[44]

Even more recently, a special election was held in Los Angeles City Council District 2, which substantially overlaps CD 28. It pitted a white candidate, Wendy Gruel, against a Latino, Tony Cardenas. Although Gruel defeated Cardenas by less than 300 votes out of a district-wide total of 29,351 votes cast, Cardenas won the precincts that are within CD 28 in both the primary and general elections. CD 28 has a slightly higher Latino voting-age population

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[43] Delgadillo finished second in the primary election in the precincts comprising CD 28. The white incumbent City Councilmember received 41.79% of the votes cast, while Delgadillo received 37.58%. A third candidate, a white woman, received 16.32% of the vote. As noted in the text, however, Delgadillo defeated the City Councilmember in the run-off election where they were the only candidates on the ballot.

[44] Villaraigosa also won the primary election in the precincts within CD 28. He garnered the highest number of votes of the five candidates in the race, securing 36.51% of the vote within the district. The next closest finisher – a white candidate – received 21.66% of the vote.

as a whole than do its precincts that are in City Council District 2. Thus, the results of this election also support the conclusion that a non-Latino bloc does not regularly defeat Latino, or Latino-preferred, candidates, but that, to the contrary, Latino candidates prevail within the district with some regularity.[45]

Plaintiffs contend that the results of certain statewide ballot initiatives, most notably Proposition 187, demonstrate that CD 28 is a district in which the non-Latino voters are hostile to Latino interests. Proposition 187, which passed in 1994, proposed denying public services to undocumented aliens. Plaintiffs cite figures from all the Assembly, Senate, and Congressional districts that overlap to any extent the version of the district that MALDEF proposed in July and/or September 2001 during the course of the redistricting process. The results of this study demonstrate that Latinos voted "no" in margins far higher than non-Latinos. As defendants point out, this data cannot raise a triable issue of fact because it includes vast

[45] The essence of plaintiffs' complaint is that as a result of the redistricting legislation, a Latino is less likely to win a Democratic primary in CD 28; given the overwhelmingly Democratic character of the district, plaintiffs correctly represent that the only election that really matters to voters' ability to elect candidates of choice in CD 28 is the Democratic primary. Accordingly, it is important to note that the figures cited above most likely understate the extent to which white voters would cross over to support Latino candidates in a Democratic primary. This is so because white Democrats generally appear more willing to support Latino candidates than do white Republicans. The only reasonable inference to be drawn is that the percentage of white voters who supported Latino candidates in the nonpartisan elections discussed in the text – i.e., the elections for Mayor, City Attorney, and City Councilman – is lower than would be the cross-over percentage in a Democratic primary.

swaths of territory outside of CD 28. The State Senate, Assembly and Congressional districts that Dr. Kousser studied include such communities as Sunland/Tujunga, Montrose/La Crescenta, Glendale, San Marino, and Temple City. All of these areas are far outside the boundaries of CD 28 as drawn by the legislature. The inclusion of these communities in Dr. Kousser's study altered the demographics of the population being studied significantly from that found within the legislature's CD 28.[46]

The results of the vote on Proposition 187 in the specific precincts that the legislature transferred in or out of CD 28 also support the conclusion that plaintiffs have failed to raise a triable issue of fact regarding *Gingles* precondition three. Those results are striking: In the area that the legislature removed from CD 28 during the 2001 redistricting, and that plaintiffs challenge as a dilution of the Latino vote, 39% of the population voted no on Proposition 187. However, in the area added to CD 28 in the south part of the Valley, which plaintiffs seek to have removed from the district, 51% of voters voted no. Thus, if opposition to Proposition 187 is indicative of a favorable attitude towards Latinos and an absence of discriminatory

[46] According to United States Census Bureau statistics, of which we take judicial notice, San Marino has a population that is 48.1% white, 46% Asian, 0.2% black and 4.2% Latino. The population of La Canada Flintridge is 74.2% white, 19% Asian, 0.4% black, and 4.3% Latino. Similarly, the population of La Crescenta-Montrose is 69.8% white, 17.5% Asian, 0.5% black and 8.8% Latino. Temple City's population is 41% white, 38.3% Asian, 0.7% black, and 18.1% Latino, while Glendale's population is 56.4% white, 16% Asian, 1.2% black, and 17.8% Latino. These figures reflect substantially higher non-Latino populations than CD 28, which is 55.65% Latino, 31.41% white, 4.29% black, and 6.29% Asian.

animus, then it would appear that the changes to CD 28 rendered it a *more* favorable district for Latino candidates.

In CD 28, as in SD 27, plaintiffs rely on Dr. Kousser's theory of "Latino electoral success" to argue that Latino candidates will regularly be defeated by non-Latino bloc voting. However, for the reasons we have stated, in this case the third *Gingles* pre-condition cannot be satisfied by a theoretical projection of a minority candidate's chances of winning or losing that is based on statewide figures; *Gingles* demands a "searching practical evaluation of past and present reality" in the particular area in which the challenged districts are located. 478 U.S. at 48. The evidence related to CD 28 gives rise to only one reasonable conclusion: that the district, as presently constituted, is a district in which neither Latinos nor Latino-preferred candidates are regularly defeated by a non-Latino bloc vote. To the contrary, Latino candidates who run in the area covered by the district generally prevail. Accordingly, the 2001 redistricting plan does not have the effect of diluting the minority vote in CD 28.

### D. Conclusion

Because no question of triable fact exists regarding *Gingles* pre-condition three with respect to plaintiffs' traditional § 2 challenges to SD 27 and CD 28, defendants' motion for summary judgment is granted as to those claims.

## III. Plaintiffs' Intentional Vote Dilution Claims

Plaintiffs' final set of claims alleges that in amending the boundary lines of CD 28 and CD 51, the legislature intentionally diluted the vote of Latinos in violation of

both the Equal Protection Clause and § 2 of the Voting Rights Act. In order to prove intentional vote dilution, plaintiffs must both demonstrate the requisite type of discriminatory intent, *Bolden,* 446 U.S. at 66, and establish dilutive effects on "the voting potential of racial or ethnic minorities." *Id.; Garza v. County of Los Angeles,* 918 F.2d at 771 ("Even where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result.").

A. Discriminatory Intent

We note at the outset that the type of racial intent alleged by plaintiffs appears to be quite different from the type of intent that *Bolden* requires that plaintiffs prove in intentional vote dilution cases. As discussed earlier, no opinion in *Bolden* gained the votes of a majority of the justices. Nevertheless, a majority did agree that in order to prove an intentional vote dilution claim, a plaintiff must show invidious discriminatory intent. *Bolden* characterizes the intent required in such cases as a purpose "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." 446 U.S. at 66 (citations omitted). In order to prove that purpose, *Bolden* continues, a plaintiff must show that "the disputed plan was conceived or operated as a purposeful device to further racial discrimination." *Id.* (internal alterations and citations omitted).

Assuming plaintiffs' proffered evidence to be true, we seriously question whether it raises a genuine issue of fact with respect to the type of invidious intent required under *Bolden.* Certainly, the redistricting plan as a whole and the distribution of congressional seats within Los Angeles County does not reflect such an intent. The legislature had

the opportunity to create only one additional seat as a result of the most recent decennial census. The seat it created is in a majority-Latino district located in the southeastern portion of Los Angeles County. The district is concededly safely Democratic; Democrats constitute 56% of the electorate. A Latina is the Democratic nominee in this district in the upcoming general election. Her Republican opponent is a Latino. Accordingly, it is fair to conclude that the 2001 redistricting plan was designed to enhance the representation of Los Angeles County Latinos in Congress. As a result of redistricting, five of fifteen (33 1/3%) congressional seats with some territory in Los Angeles County will almost certainly be held by Latinos, although Latinos constitute only 24% of the county's registered voters, 44% of the total county population, probably somewhat less than a third of the voting-age population, and an even lower percentage of the citizen voting-age population.[47] *Cf. De Grandy,* 512 U.S at 1017-18 (holding, in an effects case, that rough proportionality in minority representation, although not a "safe harbor," will often be a defense to vote dilution claims).

The evidence in the record is also uncontroverted that Latino legislators and interest groups played a significant role in the 2001 redistricting process with respect to both

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[47] We note that Latinos in Los Angeles County have substantial representation in the California State Senate as well; plaintiffs do not dispute that there are five Latino State Senators whose districts are entirely or in part within Los Angeles County. These Latino Senators represent 37% of the county's population. *Id.* Of the twelve Senate Districts that are predominantly within Los Angeles County (SD 17, 20-30), one-third of the seats are currently held by Latinos (SD 20, 22, 24, 30).

CD 28 and CD 51. This case is therefore unlike *Rogers v. Lodge,* in which plaintiffs established invidious intent largely through the exclusion of the minority group from the procedures that established district lines and set the rules for the political process. 458 U.S. at 624; *see also Garza,* discussed *supra,* at pp. 61-63. To the contrary, here the evidence is undisputed that the legislature heard extensive testimony from Latino organizations during the redistricting process, and that the redistricting plans were significantly revised to address Latino concerns. For instance, the inclusion of Imperial County in CD 51 was a result of lobbying by Latino advocacy organizations, as was the increase in the number of Latino voters in CD 28 in the second draft of the redistricting plan.

Moreover, California's political system is far from closed to Latinos. The Legislature as a whole, as noted earlier, is 22.5% Latino. It has an extremely active Latino caucus; both the Assembly and Senate redistricting committees included Latino members. At the time the redistricting bill was enacted, Latinos holding leadership positions in the legislature included the Senate Majority Leader, Richard Polanco; the Senate Majority Whip, Richard Alarcon; the Senate Judiciary Committee Chair, Martha Escutia; the Assembly Floor Leader, Marco Firebaugh; the Assembly Assistant Majority Leader, Juan Vargas; and the Assembly Budget Committee Chair, Tony Cardenas; as well as the Lieutenant Governor, Cruz Bustamante, who serves as President of the California Senate. In addition, at the time the redistricting bill was being considered, two of the three most recent Speakers of the Assembly were Latinos. Moreover, the record reflects that Latinos are not excluded from the internal hierarchy of the majority political party in California; long-time

California Democratic Party Chairman Art Torres is also Latino, and the party has nominated Latino candidates for statewide office.

Plaintiffs' intent allegations regarding the two districts are similar; they contend, essentially, that the legislature deliberately limited the number of Latinos in each district, not as a consequence of any hostility towards Latinos or their role in the political process, but in order to render the incumbents in these districts less susceptible to primary challenges from Latino candidates. With respect to CD 28, plaintiffs allege that map-drawer Michael Berman intentionally removed certain Latino communities in order to reduce the chances that the incumbent congressman, his brother, would face a challenge from a Latino primary opponent. Assembly Member Juan Vargas, a Latino representative from San Diego who was a member of the legislature's redistricting committee, has offered his opinion that by accepting the plan proposed in part by Michael Berman, the legislature operated with a discriminatory intent. Additionally, plaintiffs put forward the testimony of a Latino community activist, Xavier Flores, regarding conversations with Rep. Brad Sherman, who represents CD 27, the district adjacent to CD 28. According to Flores, Sherman was aware that Michael Berman sought to minimize the number of Latinos in CD 28, and Berman explained to Sherman that the first draft of the congressional districting plan artificially lowered the number of Latinos in that district so that there would be an opportunity to negotiate over the final figure. As a result of the 2001 redistricting, the Latino population of CD 28 was reduced from 65% to 56%, and the Latino VAP from 60% to 49%.

The allegations with respect to CD 51 are similar. Plaintiffs contend that the legislature removed San Diego County neighborhoods from the district so as to cap the district's Latino voting strength at 40% of the VAP. The foundation for the claim is primarily the testimony of Assembly Member Vargas, who offers the opinion that the legislature's aim in drawing the revised CD 51 was to insulate the incumbent, Congressman Filner, against a successful primary challenge by a Latino. Vargas himself challenged Filner in what was, by both parties' accounts, an expensive, nasty primary race in 1996, which Filner won 54%-46%. Vargas asserts that many of the incumbent members of the California congressional delegation, including Filner, paid $20,000 per person to obtain the services of the legislature's chief map-drawing consultant, Michael Berman. In exchange, he contends, Berman, took steps to render their districts less susceptible to potential challengers, both partisan and ethnic.

Plaintiffs admit that they do not allege that defendants were motivated by racial hostility. Nor do they suggest that there was any desire to effectuate invidious racial discrimination generally. Although we assume, for summary judgment purposes, the truth of plaintiffs' intent evidence, and of their charge that the legislature sought to limit the number of Latino voters in the two districts at issue, given the background and record of California's 2001 redistricting, the evidence does not support an inference that the legislature intended to marginalize a racial group politically through invidious discrimination, or invidiously to maintain a system that perpetuates racial discrimination. Thus the intent appears not to be of the type that the Supreme Court held necessary for an intentional vote dilution claim in *Bolden, Rogers,* and

*Bandemer.* Leaving aside plaintiffs' proffers, the other evidence as to intent reflects a complex set of legislative motivations that comprehended several goals, including protecting incumbents, ensuring adequate representation for Latinos and other minority groups through the establishment of majority-minority districts such as the new CD 39, and advancing partisan interests.[48] Given the facts and circumstances in the record before us, including (1) the use of traditional districting principles to establish the districts in question, (2) the absence of any legal necessity to create another new majority-minority Congressional district in addition to the one being newly-created in the redistricting statute, and (3) the high degree of Latino representation and participation in the redistricting process, we strongly doubt that the 2001 redistricting statute was a "purposeful device to further racial discrimination," in whole or in part. *Bolden,* 446 U.S. at 66 (internal alterations and citations omitted).

B. Effects of Intentional Vote Dilution

We do not, however, rest our grant of summary judgment on the lack of invidious intent, for even if the plaintiffs could establish such intent, they have failed to offer proof of the necessary dilutive effects. Plaintiffs in an intentional vote dilution case still bear the burden of

[48] Indeed, the Latino community organizations that sought to intervene as defendants, *see* n. 4, *supra,* contend that Latino interests are better advanced by protecting the incumbency of Congressman Howard Berman, who they assert has strongly supported Latino causes, and by the creation of districts in which Latinos maintain influence through coalition-building with other ethnic and racial groups.

proving a dilutive effect. *Rogers,* 458 U.S. at 621 (holding that a minority group cannot "prove purposeful discrimination" absent sufficient evidence of dilutive effect); *Garza,* 918 F.2d at 771.

The necessary showing of effects for a traditional § 2 claim of vote dilution is well-established; as discussed above, the *Gingles* factors and the *De Grandy* totality-of-the-circumstances inquiries set forth settled principles to be applied in determining whether a plaintiff can establish the effects that are necessary for a statutory violation. In contrast, the effects standard for an intentional vote dilution claim is uncertain, largely because of a dearth of precedent. The cases provide little direct authority as to the requisite degree of dilutive effect for an intentional discrimination claim under either the constitution or the statute. This is so in part because direct evidence of discriminatory intent is relatively rare, *Price-Waterhouse v. Hopkins,* 490 U.S. 228, 271 (1986) (O'Connor, J., concurring), and thus plaintiffs generally prefer to bring traditional § 2 vote dilution cases where intent need not be shown, rather than constitutional or statutory intentional vote dilution claims. *See* Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, THE LAW OF DEMOCRACY 406-07 (1998). In fact, since the 1982 amendments to the Voting Rights Act, which eliminated the intent requirement for statutory vote dilution claims, there has been a virtual absence of intentional vote dilution litigation.[49]

[49] Only for a two-year period between the decision in *City of Mobile v. Bolden* and the 1982 Voting Rights Act Amendments was a plaintiff required to prove intent in order to prosecute a claim of vote dilution. And, "[a]fter the Supreme Court decided *Bolden,* vote dilution litigation

(Continued on following page)

Plaintiffs urge us to adopt a standard of effects in intentional vote dilution cases, both constitutional and statutory, that is considerably less demanding than that required in traditional § 2 cases. In support of this approach, plaintiffs cite *Garza v. County of Los Angeles,* 918 F.2d 763 (9th Cir. 1990), a case that, like this one, included both constitutional and statutory intentional vote dilution claims. *Garza,* however, does not provide the clear direction that the plaintiffs assert it does. In that case, the court stated that a standard "less rigorous" than the § 2 effects standard applies to intentional vote dilution claims; nevertheless, the court then went on to cite *White v. Regester* – the case that established the very effects test adopted in 1982 – as well as the verbatim language of § 2 itself, as the appropriate measure for determining effects in intentional vote dilution cases. *Id.* at 771. More important, *Garza* relaxed only the first *Gingles* pre-condition. *Garza* held that in light of plaintiffs' contentions that the Los Angeles County Board of Supervisors intentionally fragmented the Latino population so as to prevent Latinos from constituting an effective majority district, the plaintiffs did not need to show that the district they proposed would immediately be such a district.

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virtually shut down." ISSACHAROFF ET AL., *id.,* at 441. Thus, the principal intentional vote dilution cases decided by the Supreme Court are *Rogers* and *Bolden.* Courts and commentators are divided as to whether *White v. Regester* required proof of intent for a vote dilution claim, or merely proof of effects. In amending § 2, however, Congress adopted the view that *Regester* required effects only, and we agree. 1982 U.S.C.C.A.N. at 205.

We agree that, where invidious intent exists in a vote dilution case, it may be appropriate to relax the first or even second of the *Gingles* pre-conditions, as well as to consider intent in connection with the "totality of the circumstances" inquiry.[50] We do not accept defendants' contention that in a case in which plaintiffs allege an intentional violation of the Fourteenth Amendment, proof of discrimination is wholly irrelevant. Nevertheless, plaintiffs in vote dilution cases must still show a practical effect on the minority group's ability to elect representatives of choice, whether or not intent is shown. In *Gingles,* the Court recognized this requirement of a practical effect primarily through the inclusion of pre-condition three – that in order to establish a traditional § 2 claim, a plaintiff must establish that a minority group's preferences are regularly defeated by a non-minority bloc of voters. In our view, the irreducible minimum in intentional vote dilution cases is similar.

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[50] Plaintiffs cite language from *De Grandy* in support of their contention that the dilutive effect that need be shown in an intentional discrimination case under the constitution and the statute is lower than that which need be shown in a traditional § 2 case. Specifically, they quote a statement found in the Court's discussion of proportionality, which rejects the state's argument that "the most blatant racial gerrymandering in half of a county's single-member districts would be irrelevant under § 2 if offset by political gerrymandering in the other half, so long as proportionality is the bottom line." *De Grandy,* 512 U.S. at 1019. We note that the Court's discussion concerns the "totality-of-the circumstances" test, and agree, as indicated in the text, that proof of intentional discrimination should be considered in this context. The quoted language does not convince us, however, that the required proof of dilutive effects should be relaxed to the full extent plaintiffs appear to suggest.

The essence of any successful vote dilution claim must be that the ability of a minority community to elect representatives of choice is adversely affected. If the legislature intentionally renders impotent the will of the minority community by dividing it among two or more districts in which the other voters are hostile to minority candidates, or by submerging it in a multi-member district in which a non-minority bloc refuses to support minority candidates, then a vote dilution claim will likely prevail. However, if a district is drawn in which Latinos constitute a plurality, non-Latino voters have shown that they are willing to vote for Latino candidates, and Latino candidates receive a majority of the overall vote with some regularity, then the most basic and necessary dilutive effect is lacking. That is precisely the case here. As respects both CD 28 and CD 51, the right of Latinos to elect candidates of their choice has not been abridged.

1. Congressional District 28

Plaintiffs' intentional dilution claims regarding CD 28 fail to raise a question of material fact because of the uncontested evidence described earlier. Latino candidates win elections in the territory that constitutes CD 28, and they do so with the support of non-Latino voters. It would undoubtedly be easier for Latinos to elect candidates of choice in the version of the district proffered by plaintiffs. However, in order for minority group members to establish a redressable vote dilution injury, they must at the very minimum demonstrate that they are unlikely to be able to elect minority candidates due to the hostility of non-minority voters. Because plaintiffs have not raised a question of material fact with respect to this essential part of the vote dilution inquiry, we hold that the intentional

vote dilution claims are not supported by sufficient evidence of effects, and summary judgment in favor of the defendants must be granted.[51]

2. Congressional District 51

We need not deliberate as to whether a genuine question of fact exists with respect to Latino voters' ability to elect candidates of choice in CD 51. Plaintiffs *admit* that the legislature established a district that is a fair opportunity district for Latinos – one in which they can elect candidates of their choice. Indeed, plaintiffs' expert witness, Dr. Kousser, conceded in his report that "there was no discriminatory effect in the drawing of congressional district 51." The population in the district is 53% Latino, the VAP is 49% Latino, and the registered voters are 39.84% Latino. This is a modest *increase* from the district as it was previously constituted. Plaintiffs' admission regarding the effectiveness of CD 51 was thus compelled by the facts, and forecloses any claim of vote dilution, constitutional or statutory. *Garza,* 918 F.2d at 771.

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[51] We note that plaintiffs bring intentional vote dilution claims under both the Equal Protection Clause and § 2 of the Voting Rights Act. It is unclear whether there is a separate claim of intentional dilution under § 2 that differs from the traditional § 2 claim. *Barnett v. Daley,* 32 F.3d 1196, 1202 (7th Cir. 1994) ("It is, indeed, no longer clear that intent plays any role in a suit under section 2 of the Voting Rights Act . . ."). Nor is it clear that any such intentional § 2 claim, if it exists, would require any different proof than a constitutional vote dilution claim. We need not consider those questions, however, because regardless of the form of the intentional claim asserted here, plaintiffs have failed to offer proof that satisfies the minimal effects requirement described above.

In light of the admission that the district is a fair one, plaintiffs advance another, wholly unprecedented argument in support of their intentional dilution claim. Plaintiffs implicitly acknowledge that Latino voters who reside in CD 51 do not suffer a vote dilution injury, as they vote in a district that provides Latinos a fair opportunity to elect candidates of choice. Accordingly, they assert only that the voters who were *not* placed in CD 51 suffered a vote dilution injury because they were denied the privilege of residing in a majority-Latino district. No court has ever found such an injury, and plaintiffs cite no cases in support of their novel proposition. More important, to hold that such an injury is cognizable would throw redistricting law into disarray and render almost any remedial § 2 district subject to challenge. As Justice Powell observed, redistricting necessarily requires legislatures to consider individual voters in the context of their membership in various groups – especially racial and ethnic groups, but also political parties and other entities. *Davis v. Bandemer,* 478 U.S. 109, 167 (1986) (Powell, J., concurring and dissenting) ("The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."). It is thus the group and not the individual whose voting power must be diluted if a vote dilution claim is to be upheld. *See* Heather K. Gerken, *Understanding the Right to An Undiluted Vote,* 114 HARV. L. REV. 1663, 1678-79 (2001).

Sections 2 and 5 of the Voting Rights Act compel states and localities to draw majority-minority districts under certain circumstances; if each individual minority group member not included in such a district had standing to challenge the creation of the district because he was not placed within it, every § 2 remedial district would be

vulnerable to constitutional challenge. When we analyze a claim of vote dilution, we necessarily examine the voting power of the group: individual voters who are members of the group, and are assigned to an otherwise-lawful neighboring district, cannot bring a vote dilution challenge where the group is capable of electing representatives of choice in the district from which the voters claim to have been improperly excluded. There is simply no dilution of the group's voting power as a result of that assignment. Accordingly, summary judgment is appropriate on plaintiffs' intentional vote dilution claims on behalf of voters not placed in CD 51.

## CONCLUSION

The evidence in the record before us permits only one conclusion: drawing the necessary inferences for the purposes of summary judgment, it is apparent that the legislature deliberately chose not to create majority-Latino districts in CD 28 and CD 51, and that the effect of its decisions with respect to SD 27 was not to create such a district. These legislative actions, however, violated neither the Voting Rights Act nor the Constitution. The legislature lawfully chose to exercise its considerable discretion in redistricting to create three districts in which Latinos are the largest single ethnic or racial group, in which Latinos will inevitably play a significant role in the election of representatives, and in which Latino candidates may well be elected to office when the current incumbents leave their posts if not before. Moreover, Latinos participated fully in the redistricting process and elected Latino representatives, many of whom hold important positions in the state legislature, overwhelmingly approved the

redistricting plan. Accordingly, defendants' motions for summary judgment are **GRANTED**.

It is so ordered.

**UNITED STATES DISTRICT COURT P SEND**
**CENTRAL DISTRICT OF CALIFORNIA**

**CIVIL MINUTES – GENERAL**

Case No.: CV 01-08477 MMM (RCx) Date: March 28, 2002

Title: *Cano, et al. v. Davis, et al.*

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**DOCKET ENTRY**

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**PRESENT:**

**HONORABLE STEPHEN REINHARDT, UNITED STATES CIRCUIT JUDGE; HONORABLE CHRISTINA SNYDER, UNITED STATES DISTRICT JUDGE; HONORABLE MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE**

| **Anuel Huerta**<br>**Deputy Clerk** | **N/A**<br>**Court Reporter** |
|---|---|
| **Attorneys Present for Plaintiff(s):**<br>None | **Attorneys Present for Defendant(s):**<br>None |

**PROCEEDINGS:** **Order Granting Motions to Quash Subpoenas Ad Testificandum And Duces Tecum Served on Congressman Berman, Filner, And Sherman**

Pursuant to the stipulation of counsel, Local Rule 7-15 and Rule 78 of the Federal Rules of Civil Procedure, the court vacated the March 26, 2002 hearing on the motions of Congress Members Howard Berman, Brad Sherman and Bob Filner to quash the subpoenas ad testificandum and duces tecum served on them by plaintiffs, and found the matter suitable for decision without oral argument.

Having considered the briefs submitted by counsel, the court grants the motions as set forth below.

On February 13, 2002, plaintiffs served a staff member in Congress Member Sherman's Woodland Hills office with subpoenas compelling him to appear for deposition and produce documents.[1] The subpoena ad testificandum noticed Sherman's deposition in Los Angeles on March 14, 2002, when Sherman was scheduled to be in Washington, D.C.[2] The subpoena duces tecum required production by Sherman, his agents and staff of a broad range of documents regarding the 2000-2001 redistricting process.[3] On February 14, 2002, plaintiffs served subpoenas on Congress Member Berman's District Office in Mission Hills. While plaintiffs notified the parties that they planned to serve subpoenas on Congress Member Filner, such service has not been effected to date.[4]

"Exceptional circumstances" are necessary to compel discovery from high ranking government officials. See *In re United States* (*Kessler*), 985 F.2d 510, 512 (11th Cir. 1993) (per curiam) (holding that high ranking government officials " . . . 'should not, absent extraordinary circumstances, be called to testify regarding their reasons for

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[1] See Memorandum of Law in Support of motion to Quash Third Party Subpoenas to Congressman Brad Sherman ("Sherman Mot.") at 3:16-19.

[2] See *id.* at 4:34; Ex. A.

[3] See *id.* at 4:5-8; Ex. B.

[4] See Memorandum in Support of Motion of Congressmen Filner and Berman to Quash Subpoenas ("Berman/Filner Mot.") at 5:14-24. Neither the Berman nor the Sherman subpoena was properly served as required by Rule 45 of the Federal Rules of Civil Procedure.

taking official actions.' . . . [They] have greater duties and time constraints than other witnesses . . . ," quoting *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)). See also *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (affirming "a settled rule . . . that 'exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted,'" quoting *In re Officer of Inspector General*, 933 F.2d 276, 278 (5th Cir. 1991)); *Kyle Engineering Company v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) ("Heads of government agencies are not normally subject to deposition").

Courts have articulated a variety of factors relevant in assessing whether exceptional circumstances are present. Among the factors courts examine is whether the high ranking official "possess information essential to [the] case which is not obtainable from another source. . . . " *In re United States (Reno)*, 197 F.3d 310, 314 (8th Cir. 1999) (citing *In re FDIC, supra*, 58 F.3d at 1062). The Eighth Circuit, in fact, has gone so far as to state that the party seeking discovery must "show an entitlement to the relief sought in the case." *In re United States (Reno), supra*, 197 F.3d at 314. See also *In re FDIC, supra*, 58 F.3d at 1062 (denying defendants the right to depose high ranking officials of the FDIC after the agency brought a declaratory relief action because there was not "a strong showing of bad faith or improper behavior" in the record, "notwithstanding Pacific Union's allegations of misconduct (including conspiracy and cover-up) and assertions of gross abuse of power by government agencies and officials").

Plaintiffs assert that the Congress Members possess evidence relevant to the California Legislature's intent in enacting the redistricting plan, and that such evidence is relevant both to their Fourteenth Amendment and Voting Rights Act claims. It is clear, however, that with respect to both species of claim, plaintiffs must, in addition to proving intent, also prove that the Legislature's redistricting plan had a discriminatory effect on Latino voters. See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) ("Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter"); *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (to prevail on Fourteenth Amendment vote dilution claim, plaintiffs must prove intentional discrimination against an indentifiable political group; and an actual discriminatory effect on that group); *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) ("Even where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result").

The Senate defendants have filed motions for summary judgment asserting that plaintiffs cannot raise a triable issue of fact regarding the discriminatory effect of the redistricting plan in the challenged State Senate and Congressional districts. Defendants' motions also challenge, *inter alia*, the legal merit of plaintiffs' claim under *Shaw v. Reno*, 509 U.S. 630 (1993). The Congress Members argue that, until these motions are decided, and it is determined both that plaintiffs have adduced sufficient

evidence of discriminatory effect to move beyond summary judgment, and that plaintiffs' *Shaw* claim is legally tenable,[5] they cannot demonstrate that the Congress Members' deposition testimony is "essential" to their case. They argue further that plaintiffs cannot make a sufficient showing of entitlement to relief on the merits to warrant compelling the discovery under the "exceptional circumstances" standard applicable to high ranking officials.

The Supreme Court has cautioned that district courts adjudicating legislative redistricting claims must be mindful of "the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at various stages of litigation and determining whether to permit discovery or trial to proceed." *Miller v. Johnson*, 515 U.S. 900, 916-917 (1995). Coupled with the "exceptional circumstances" standard applicable to depositions and discovery requests served on high ranking government officials, *Miller* counsels that the present subpoenas be quashed until such time following disposition of defendants' summary judgment motions as the

[5] Defendants have raised substantial questions as to whether the challenged districts are of the type that can be the subject of a successful *Shaw* claim. The court believes it prudent to resolve that legal issue before addressing the factual merits of the claim or authorizing discovery relevant to it.

court determines that discovery regarding issues of intent is appropriate.[6]

Initials of Deputy Clerk /s/ AH

**cc: Counsel of record (or parties)**

[6] It is true, as plaintiffs note, that the court, in its order denying plaintiffs' application for temporary restraining order, stated that it believed plaintiffs presented sufficiently serious questions to make the case a fair ground for litigation. The court also stated, however, that it could not conclude on the limited record before it that plaintiffs would probably succeed on the merits of their claims. It is precisely the limited nature of the temporary restraining order record that leads the court to conclude that any assessment as to whether the Congress Members' testimony is "essential" should await resolution of the pending summary judgment motions.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| MARIA CANO; PAULA RANGEL; MARIA CALLEROS; NORMA E. RAMIREZ; MARGO MUNOZ; BENNIE G. CORONA; MYRON GARCIA; FRANK DIAZ; CONSUELO E. RODRIGUEZ; JOSE RUELAS; RACQUEL TORRES; ENRIQUE F. ARANDA; JOSEPHINE SANTIAGO; ANTONIO M. LOPEZ; JOSE R. PACHECO; LUIS NATIVIDAD; MARISOL NATIVIDAD; LUIS GARCIA; LUZ PALOMINO; SILVIA PALOMINO; IGNACIO LEON; JOAQUIN GALAN; ERNESTO BUSTILLOS; CATHY ESPITIA; SALVADORAN AMERICAN LEADERSHIP AND EDUCATIONAL FUND,<br><br>Plaintiff(s),<br><br>vs. | ) CASE NO.<br>) CV 01-08477 MMM (RCx)<br>)<br>) THREE-JUDGE COURT<br>)<br>) The Honorable<br>) Stephen Reinhardt<br>) The Honorable<br>) Christina A. Snyder<br>) The Honorable<br>) Margaret M. Morrow<br>)<br>) ORDER GRANTING IN PART AND DENYING IN PART ASSEMBLY SPEAKER WESSON'S MOTION FOR PROTECTIVE ORDER RE DEPOSITION OF ASSEMBLYMEMBER JUAN VARGAS AND DENYING SENATE DEFENDANTS' MOTION FOR PROTECTIVE ORDER RE DEPOSITION OF ANTONIO GONZALEZ |

GRAY DAVIS, in his official capacity as Governor of the State of California; CRUZ BUSTAMANTE, in his official capacity as Lieutenant Governor of the State of California; BILL JONES, in his official capacity as Secretary of State of the State of California; JOHN BURTON, in his official capacity as President Pro Tempore of the California State Senate; ROBERT HERTZBERG, in his official capacity as Speaker of the California State Assembly,

Defendant(s).

(Filed Mar. 18, 2002)

Before REINHARDT, Circuit Judge, MORROW and SNYDER, District Judges:[1]

On March 5, 2002, the court held argument on Assembly Speaker Wesson's motion for a protective order regarding the deposition of Assemblymember Juan Vargas and the Senate Defendants' motion for a protective order regarding the deposition of Antonio Gonzalez. Having considered the briefs and the arguments of counsel, the court denies the Senate Defendants' motion, and grants in

[1] A three-judge district court consisting of one circuit judge and two district judges was convened in this case pursuant to 28 U.S.C § 2284(a).

part and denies in part Speaker Wesson's motion as follows:

1. The legislative privilege does not bar Antonio Gonzalez, a third party non-legislator, from testifying to conversations with legislators and their staffs. See *Gravel v. United States*, 408 U.S. 606, 629, n. 18. (1972). As Rule 408 of the Federal Rules of Evidence governs the admissibility of settlement discussions, not whether they are discoverable (see, e.g., *White v. Kenneth Warren & Son, Ltd.*, 203 F.R.D. 364, 368 (N.D. Ill. 2001); *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F.Supp.2d 1164, 1171 (C.D. Cal. 1998)), the court need not address the parties' dispute regarding its applicability at this time.

2. The Supreme Court has never decided whether the legislative privilege belongs to each individual legislator or to the institution as a whole. See *United States v. Helstoski*, 442 U.S. 477, 490 (1979) ("Like the District Court and the Court of Appeals, we perceive no reason to decide whether an individual Member may waive the Speech or Debate Clause's protection against being prosecuted for a legislative act"). In cases such as this one, where motivation is at issue, the court believes that an individual legislator should be able to waive the privilege over the objection of a majority of his or her peers. Given the unsettled nature of the law in this area, however, members of the court disagree as to the scope of testimony a waiving legislator should be permitted to offer if other legislators choose to assert the privilege.

3. A majority of the court concludes that, unlike Gonzalez, who is neither a member of the legislature or of its staff, and thus in not bound by any form of institutional privilege that may exist, a

member of the legislature such as Assemblymember Vargas, who elects to waive the privilege, may not give unfettered testimony regarding the legislative acts of other members. Rather, the majority concludes that such a legislator may testify only to his own motivations, his opinion regarding the motivation of the body as a whole, the information on which the body acted, the body's knowledge of alternatives, and deviations from procedural or substantive rules typically employed. He may also testify to his own legislative acts and statements, but may not testify to the legislative acts of legislators who have invoked the privilege or to those of staffers or consultants who are protected by the privilege. See *United States Football League v. National Football League*, 842 F.2d 1335, 1374-75 (2d Cir. 1988) (" . . . [T]he testimonial privilege that members of Congress enjoy under the Speech or Debate Clause of the Constitution, art. I, § 6, cannot be waived by another member . . . "); *United States v. Craig*, 528 F.2d 773, 781, n. 7 (7th Cir. 1976) ("Because the Speech or Debate Clause embodies institutional as well as personal protection, the scope of the waiver must be carefully limited. The difficulty is that the individual legislator's testimony and other evidence may involve not only his conduct but also that of the body as a whole. At that point the law is clear that 'the Speech or Debate Clause clearly proscribes at least some of the evidence' "). See also 26A Charles Alan Wright & Kenneth W. Graham, Jr., FEDERAL PRACTICE & PROCEDURE, § 5675 (2001) ("The speech or debate privilege belongs to the legislator whose legislative act is involved in the evidence").

The fact that the legislators at issue here are protected by a federal common law privilege and

not by the Speech or Debate Clause of the United States Constitution does not change the majority's view. While we agree with Judge Reinhardt that state legislators do not enjoy the type of absolute protection afforded members of the Congress under the Speech or Debate Clause, this, if anything, affects their ability to assert legislative privilege in the first instance. Whether an absolute or a qualified privilege should be recognized for state legislators' acts is a separate question from who should be permitted to waive the privilege once it attaches to an individual legislator's legislative acts.

Additionally, the majority believes it is premature to address, in the context of this discovery motion, what evidence of intent will, or will not, be admissible at trial. As it relates to the issue before us, the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development, Corp.*, 429 U.S. 252, 267 (1977), directed that, in cases where discriminatory motive could not be proved by reference to effect alone, courts should look to the historical background of the decision, the sequence of events leading to the decision, and departures from procedural and substantive norms. *Id.* It then stated: "The legislative or administrative history may [also] be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." *Id.* at 268. Later, the Court commented that "[p]lacing a decisionmaker on the stand is . . . 'usually to be avoided.'" *Id.* at 268, n. 18. These

comments strongly suggest that the legislative privilege applies in constitutional litigation alleging discriminatory motivation just as it does in other contexts. While, as Judge Reinhardt notes, subsequent cases reference testimony by individual legislators and/or documentary evidence reflecting individual legislative acts, it appears that this testimony and/or evidence was voluntarily proffered or that it was admitted without objection from other members of the legislative body.

As noted, what evidence may be admitted at trial in this action is an issue for another day. The present question is the scope of Assemblymember Vargas' waiver of the privilege. In this regard, the majority agrees with the view of the D.C. Circuit in *Brown & Williamson Tobacco Co. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995). There, the court rejected the concept that the evidentiary privilege established by the Speech or Debate Clause protects against use rather than non-disclosure. See *id.* at 419-20 ("B & W urges us to join the Third Circuit in holding that even though the Speech or Debate Clause bars the use of documents as evidence against Members, it does not privilege them against 'discovery' – and thus does not justify congressional refusals to disclose. . . . We do not share the Third Circuit's conviction that democracy's 'limited toleration for secrecy' is inconsistent with an interpretation of the Speech or Debate Clause that would permit Congress to insist on the confidentiality of investigative files . . . '). We conclude, similarly, that, to the extent invoked by members of the California legislature, the privilege protects both against disclosure and against use.

4. Judge Reinhardt concurs in sections 1 and 2, but dissents from in part from section 3. He does not

construe the legislative privilege as precluding Assemblymember Vargas from testifying at his deposition regarding the legislative acts of others. His reasons are as follows: The Supreme Court has held that the common-law testimonial privilege accorded state legislators in federal proceedings is not as broad as that provided federal legislators by the Speech or Debate Clause of the United States Constitution. *United States v. Gillock*, 455 U.S. 360, 373 (1980) (declining to recognize "an evidentiary privilege [for state legislators] similar in scope to the Federal Speech or Debate Clause . . . "). For instance, while the Speech or Debate Clause forbids the introduction of the legislative acts of federal legislators in federal criminal prosecutions, see *United States v. Helstoski*, 442 U.S. 447, 487 (1970), the *Gillock* Court held that the common-law legislative privilege does not bar the introduction of the legislative acts of a state legislator in a similar proceeding. 445 U.S. at 373 ("[A]lthough principles of comity command careful consideration [of whether to extend the legislative privilege to state legislators in federal proceedings], our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields'). The majority's creation of a blanket prohibition on testimony by state legislators as to their colleagues' acts and statements during the redistricting process is unwarranted in light of both the important federal interest at stake – the constitutional and statutory right to vote – and the less expansive nature of the common law privilege accorded state legislators. That the majority is creating such a blanket rule is beyond dispute. Although my colleagues contend that questions of admissibility should be put off until another day, their ruling barring even the

*discovery* of Assemblymember Vargas' evidence regarding his fellow legislators's acts and statements necessarily decides the question of the *admissibility* of those statements now. Statements that are not discoverable are *a fortiori* not admissible.

When a plaintiff must prove discriminatory intent on the part of a legislature, the statements of legislators involved in the process, especially leaders and committee chairmen, as well as the authors of the legislation involved, may in some instances be the best available evidence as to legislative motive. Following *Village of Arlington Heights v. Metropolitan Housing Development, Corp.*, 429 U.S. 252, 267 (1977), courts hearing redistricting matters have frequently considered testimony by legislators and staff members regarding legislative acts and statements designed to show the presence or absence of discriminatory motivation. See, e.g., *Hunt v. Cromartie*, 121 S.Ct. 1452, 1464-65 (2001); *Shaw v. Hunt*, 517 U.S. 899, 906 (1996); *Miller v. Johnson*, 515 U.S. 900, 917-18 (1995). Although it is true that the evidence other federal courts have considered may have been admitted in the absence of any assertion of a legislative privilege, there can be no doubt that the courts that admitted the evidence considered it highly relevant. See, e.g., *Miller*, 515 U.S. at 918. It would be odd were it otherwise in discriminatory intent cases. Motive is often most easily discovered by examining the unguarded acts and statements of those who would otherwise attempt to conceal evidence of discriminatory intent. See *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) ("[O]fficials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of

action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record").

I am inclined to believe that a state legislator who waives his privilege in cases involving the issue of discriminatory motivation may testify at trial to relevant statements made by other legislators and legislative staff (including consultants), subject to appropriate rulings as to admissibility. The admissibility of such testimony may depend on a number of competing considerations, including, *inter alia*, the importance of the testimony to the ultimate issue to be decided; the availability of other evidence that would point to the same conclusion; the circumstances surrounding the utterance; the extent to which the statement is deliberate and considered, or may reflect the general legislative will; the effect of admitting the statement on the legislature's legitimate need for confidentiality; and the prejudicial effect of the testimony, if any. Cf. *In Re Grand Jury (Granite Purchases)*, 821 F.2d 946, 959 (3d Cir. 1985) (rejecting a categorical bar on evidence "which may somehow reveal the 'thought processes' of state legislators"). The Second Circuit's isolated two-sentence conclusory statement in an antitrust case that the Speech or Debate Clause compels a different result sheds little light on the question before us.

With respect to discovery, I would permit the deposition of Assemblymember Vargas to proceed except as to matters otherwise not discoverable. I would defer ruling on the admissibility of his specific testimony until a later time. See *id.* at 958 ("The speech or debate privilege is at its core a

'use privilege' not a privilege of non-disclosure."); 26A Charles Alan Wright & Kenneth W. Graham, Jr., FEDERAL PRACTICE AND PROCEDURE § 5675 (2001) ("Since the speech or debate privilege is one of evidentiary non-use, it would not seem to bar discovery of legislative acts.") (citing *Benford v. American Broadcasting Co., Inc.*, 98 F.R.D. 42, 46 (D. Md. 1983)). As noted earlier, permitting discovery preserves the issue of the admissibility of the disputed testimony; prohibiting discovery forecloses its later admissibility.

Finally, I would note that in the case before us even the majority agrees that we should not afford state legislative acts the sacrosanct status that federal legislative acts are afforded under the Speech or Debate Clause by *United States v. Brewster*, 408 U.S. 501, 511 (1972). To the contrary, we are permitting the disclosure of such acts by third parties by way of deposition; the majority's ruling thus only protects the legislative acts of non-testifying legislators against disclosure by one category of deponent, other legislators who are willing to and do waive their privilege. I see no reason for erecting this partial barrier, and accordingly would permit discovery of legislative acts from both third parties and willing legislators alike, and evaluate the admissibility of such testimony in the manner described earlier, should the need to do so arise.

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| MARIA CANO, et al.,<br>Plaintiffs,<br>vs.<br>GRAY DAVIS, et al.,<br>Defendants.<br>CALIFORNIA STATE SENATE, et al.,<br>Intervenors. | CASE NO. CV 01-8477 MMM (RCx)<br>THREE JUDGE COURT<br>The Honorable Stephen Reinhardt<br>The Honorable Christina A. Snyder<br>The Honorable Margaret M. Morrow<br>JUDGMENT FOR DEFENDANTS<br>(Filed Jun. 27, 2002) |

Defendants' motions for summary judgment came on regularly for hearing on May 13, 2002. Having considered the evidence and the briefs presented by the parties, and having heard the argument of counsel, the court, on June 12, 2002, granted the motions in their entirety.

Accordingly,

IT IS ORDERED AND ADJUDGED

1. That plaintiffs Maria Cano, et al. take nothing by way of their complaint against defendants;

2. That the action be, and it hereby is, dismissed; and

3. That each party shall bear its own costs of suit.

DATED: June 17, 2002

FOR THE COURT:

/s/ Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES
DISTRICT JUDGE

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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

MARIA CANO, et al.,

Plaintiffs,

v.

GRAY DAVIS, et al.,

Defendants.

CASE NO. CV 01-08477
MMM (RCx)
THREE-JUDGE COURT

**PLAINTIFFS' NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES**

Honorable Stephen Reinhardt
Honorable Christina Snyder
Honorable Margaret Morrow

(Filed Aug. 12, 2002)

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Notice is hereby given that Plaintiffs Maria Cano, Paula Rangel, Maria Calleros, Norma E. Ramirez, Margo Munoz, Myron Garcia, Frank Diaz, Consuelo E. Rodriguez, Jose Ruelas, Raquel Torres, Luis Natividad, Marisol Natividad, Luis Garcia, Luz Palomino, Silvia Palomino, Ignacio Leon, Joaquin Galan, Ernesto Bustillos, Cathy Espitia, Jose A. Hernandez, Wendy Estevez, Imelda LaVoie, Southwest Voter Registration and Educational Project, Mexican American Political Association – San Fernando Valley Chapter, Mexican American Political Association – Imperial Valley Chapter, California League of United Latin American Citizens, League of United Latin American Citizens – District 17, and League of United Latin American Citizens – San Fernando Valley Council 3019, in *Cano v. Davis,* No. CV 01-08477 MMM (RCX) (C.D. Cal.), appeal to the Supreme Court of the United States from the order entered June 24, 2002, granting summary judgment in favor of Defendants, and from the judgment for Defendants entered July 1, 2002.

A direct appeal to the United States Supreme Court is authorized by 28 U.S.C. § 1253, 28 U.S.C. § 2101(b) and other applicable laws and rules.

DATED: August 12, 2002

RESPECTFULLY SUBMITTED,

/s/ Steven Joaquin Reyes
Steven Joaquin Reyes
Attorney for Plaintiffs

[Certificate Of Service Omitted In Printing]

**U.S. CONST. amend. XIV, § 1.**

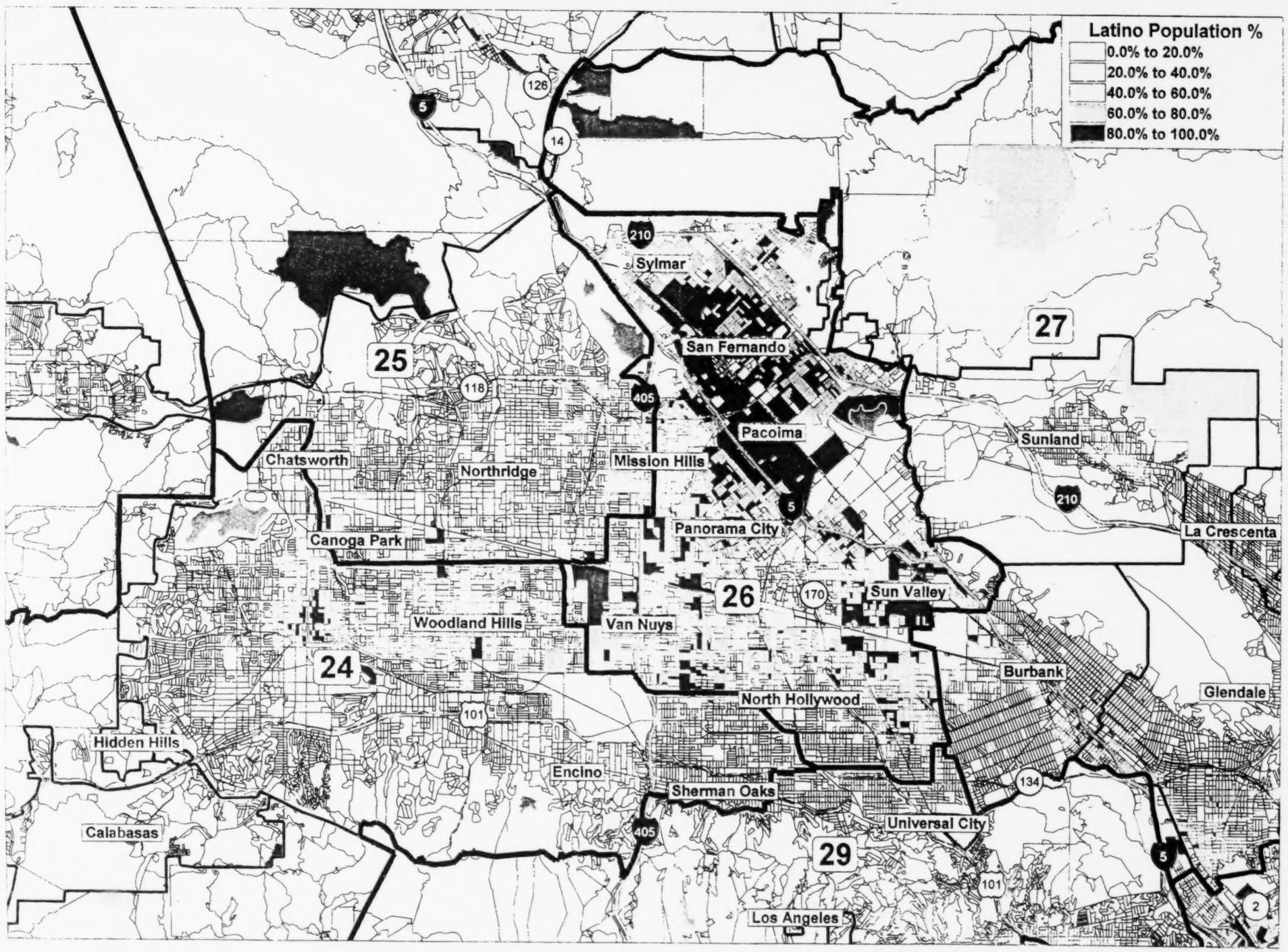
**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**42 U.S.C. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**

**(a)** No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

**(b)** A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

# 1991 Masters CD 24 and CD 26



# 1991 Masters CD 26

## District 26 Statistics (2000 Census)*

Latino Population: 431,806 (65.47%)
Latino Voting Age Population: 271,228 (60.02%)
Latino Registration: 77,576 (38.52%)

African-American Population: 32,360 (4.91%)
African-American Voting Age Population: 22,199 (4.91%)

Asian Population: 44,151 (6.69%)
Asian Voting Age Population: 34,030 (7.53%)
Asian Registration**: 9,586 (4.76%)

White Population: 135,776 (20.59%)
White Voting Age Population: 113,227 (25.06%)

Total Registration: 201,380
Democrat Registration: 118,133 (58.66%)
Republican Registration: 43,846 (21.77%)
Latino Percent of Democrat Registration: 52,536 (44.47%)

## District 26 Decade Growth Statistics

Latino Population: +130,653 (+43.38%)
Latino Voting Age Population: +78,848 (+40.99%)
Latino Registration: +47,229 (+155.63%)

African-American Population: -128 (-0.39%)
African-American Voting Age Population: -413 (-1.83%)

Asian/Pacific Is. Population***: +6,220 (+16.03%)
Asian/Pacific Is. Voting Age Population***: +5,594 (+19.26%)

White Population -59,700 (-30.54%)
White Voting Age Population: -50,333 (-30.77%)

# 1991 Masters CD 24

## District 24 Statistics (2000 Census)*

Latino Population: 124,840 (19.82%)
Latino Voting Age Population: 82,781 (17.30%)
Latino Registration: 27,438 (8.06%)

African-American Population: 19,003 (3.02%)
African-American Voting Age Population: 13,224 (2.76%)

Asian Population: 53,841 (8.55%)
Asian Voting Age Population: 40,530 (8.47%)
Asian Registration**: 14,481 (4.25%)

White Population: 416,776 (66.18%)
White Voting Age Population: 330,579 (69.10%)

Total Registration: 340,609
Democrat Registration: 153,781 (45.15%)
Republican Registration: 122,333 (35.92%)
Latino Percent of Democrat Registration: 15,400 (10.01%)

## District 24 Decade Growth Statistics

Latino Population: +47,619 (+61.67%)
Latino Voting Age Population: +28,605 (+52.80%)
Latino Registration: +15,216 (+124.50%)

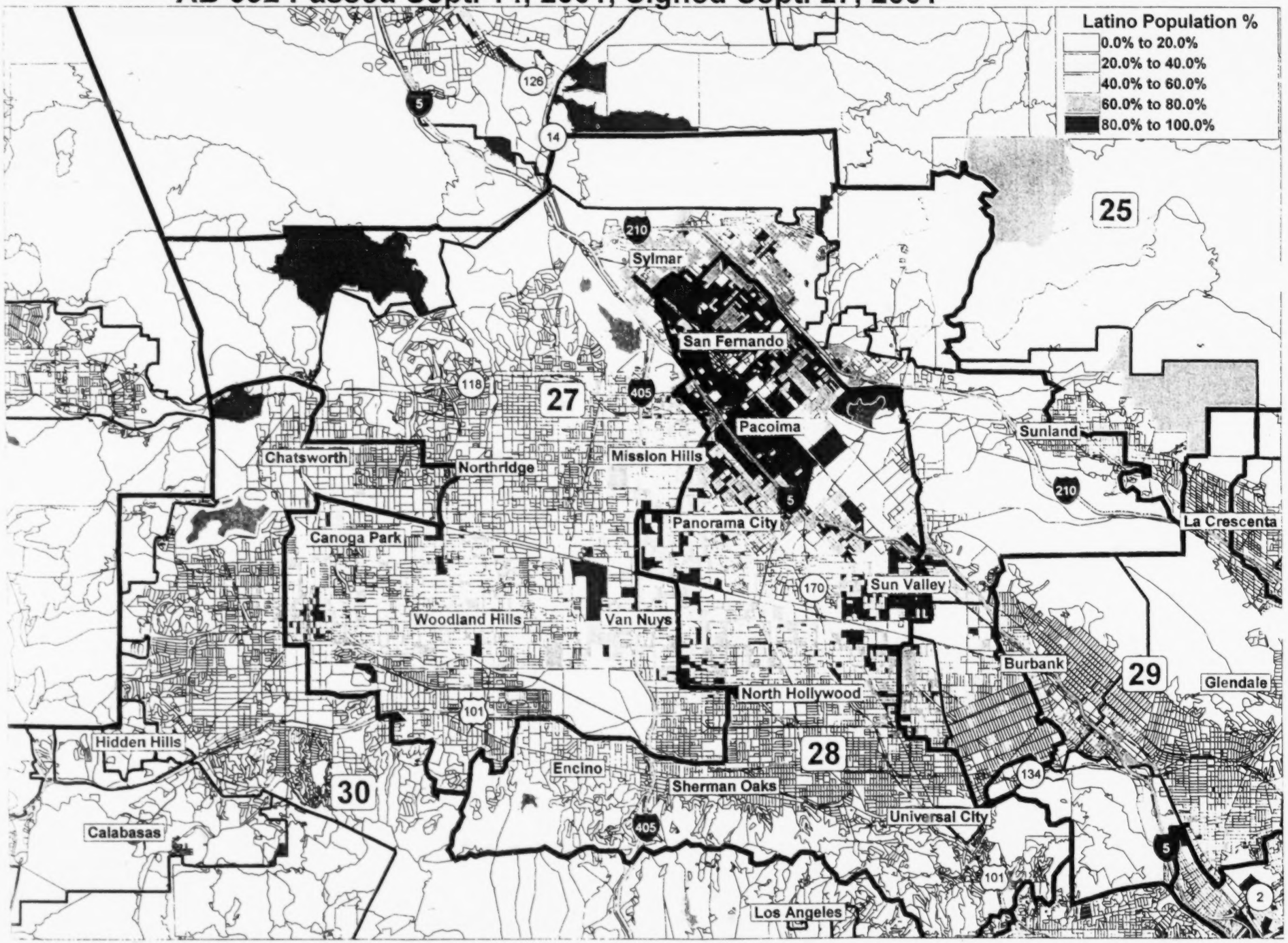
African-American Population: +7,756 (+68.96%)
African-American Voting Age Population: +4,980 (+60.41%)

Asian/Pacific Is. Population***: +18,832 (+52.36%)
Asian/Pacific Is. Voting Age Population***: +14,787 (+55.94%)

White Population -28,999 (-6.51%)
White Voting Age Population: -29,671 (-8.24%)

Data Source: US Census Bureau, Census 2000 Redistricting Data (PL 94-171) Summary File
Statewide Database (http://swdb.berkeley.edu)
*2000 Census Statistics are Dept. of Justice Recommended Categories, Registration Statistics are based on the November, 2000 General Election
**Asian Registration = Korean + Japanese + Chinese + Asian Indian + Vietnamese + Filipino Surname Matches
***2000 API = 2000 DOJ Asian + 2000 DOJ Hawaiian

# Final CD 27 and CD 28 (Berman II - Previously CD 24 and CD 26)
# AB 632 Passed Sept. 14, 2001, Signed Sept. 27, 2001



# Final CD 28
# ( Berman II - Previously CD 26 )
# AB 632 Passed Sept. 14, 2001
# AB 632 Signed Sept. 27, 2001

## District 28 Statistics (2000 Census)*

Latino Population: 355,623 (55.65%)
Latino Voting Age Population: 224,460 (49.18%)
Latino Registration: 63,138 (26.98%)

African-American Population: 27,436 (4.29%)
African-American Voting Age Population: 19,512 (4.28%)

Asian Population: 40,181 (6.29%)
Asian Voting Age Population: 31,520 (6.91%)
Asian Registration**: 9,383 (4.01%)

White Population: 200,711 (31.41%)
White Voting Age Population: 169,603 (37.16%)

Total Registration: 234,017
Democrat Registration: 136,576 (58.36%)
Republican Registration: 51,505 (22.01%)
Latino Percent of Democrat Registration: 42,930 (31.43%)

# Final CD 27
# ( Berman II - Previously CD 24 )
# AB 632 Passed Sept. 14, 2001
# AB 632 Signed Sept. 27, 2001

## District 27 Statistics (2000 Census)*

Latino Population: 232,962 (36.45%)
Latino Voting Age Population: 151,122 (31.75%)
Latino Registration: 50,921 (17.71%)

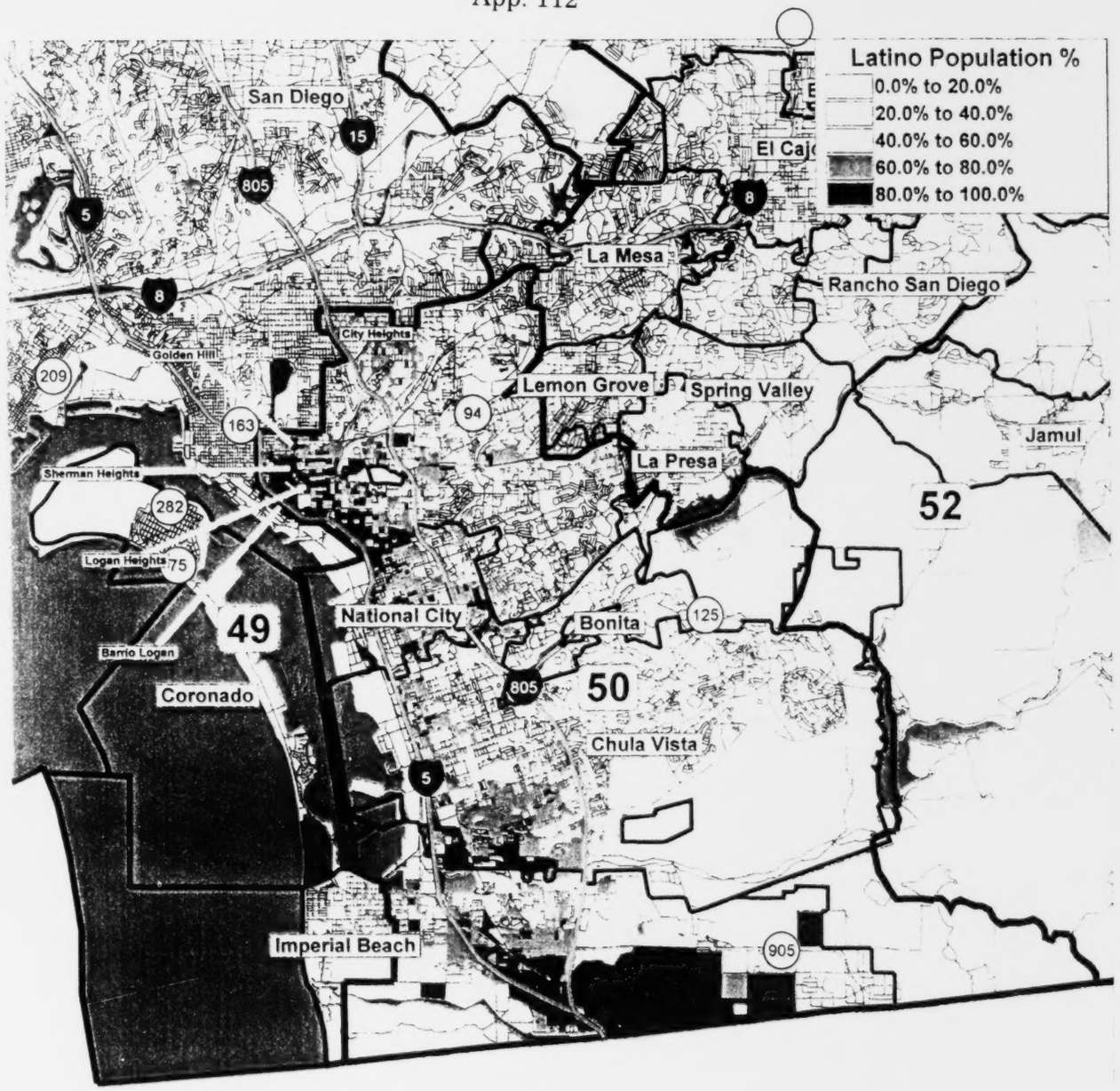
African-American Population: 30,232 (4.73%)
African-American Voting Age Population: 20,855 (4.38%)

Asian Population: 71,483 (11.19%)
Asian Voting Age Population: 54,277 (11.40%)
Asian Registration**: 17,074 (5.94%)

White Population: 286,634 (44.85%)
White Voting Age Population: 236,555 (49.70%)

Total Registration: 287,498
Democrat Registration: 140,287 (48.80%)
Republican Registration: 92,784 (32.27%)
Latino Percent of Democrat Registration: 31,007 (22.10%)

Data Source: US Census Bureau, Census 2000 Redistricting Data (PL 94-171) Summary File
Statewide Database (http://swdb.berkeley.edu)
*2000 Census Statistics are Dept. of Justice Recommended Categories, Registration Statistics are based on the November, 2000 General Election
**Asian Registration = Korean + Japanese + Chinese + Asian Indian + Vietnamese + Filipino Surname Matches




## 1991 Masters CD 50

### District 50 Statistics (2000 Census)*

Latino Population: 326,053 (50.78%)
Latino Voting Age Population: 202,852 (46.06%)
Latino Registration: 85,260 (35.04%)

African-American Population: 72,211 (11.25%)
African-American Voting Age Population: 48,428 (11.00%)

Asian Population: 94,690 (14.75%)
Asian Voting Age Population: 68,752 (15.61%)
Asian Registration**: 15,183 (6.24%)

White Population: 130,923 (20.39%)
White Voting Age Population: 108,931 (24.74%)

Total Registration: 243,345
Democrat Registration: 117,653 (48.35%)
Republican Registration: 70,899 (29.14%)
Latino Percent of Democrat Registration: 47,424 (40.31%)

### District 50 Decade Growth Statistics

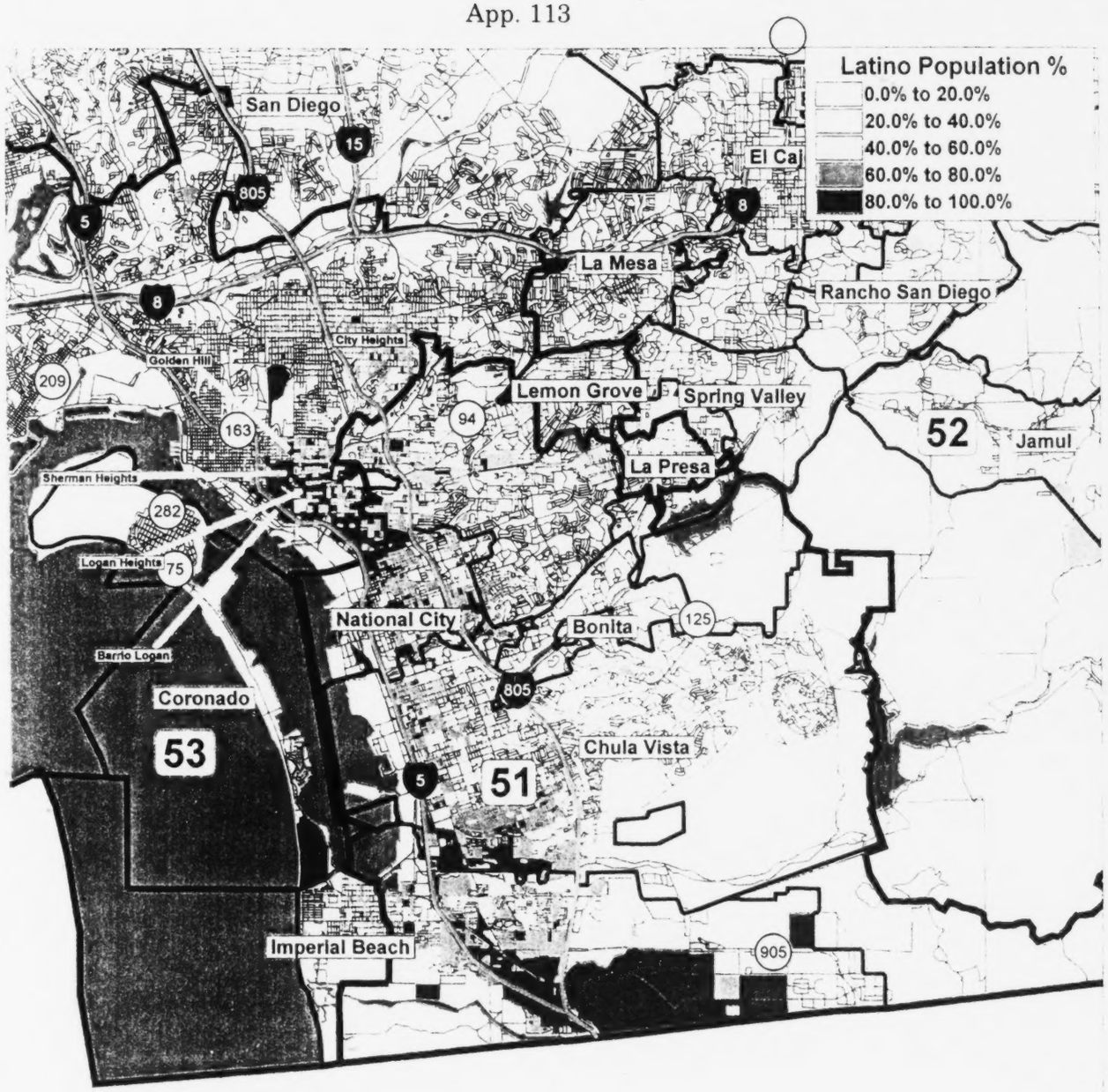
Latino Population: +93,393 (+40.14%)
Latino Voting Age Population: +57,605 (+39.66%)
Latino Registration: +39,695 (+87.12%)

African-American Population: -5,584 (-7.18%)
African-American Voting Age Population: -3,790 (-7.26%)

Asian/Pacific Is. Population***: +20,715 (+26.45%)
Asian/Pacific Is. Voting Age Population***: +18,553 (+34.86%)

White Population -49,870 (-27.58%)
White Voting Age Population: -36,519 (-25.11%)

Data Source: US Census Bureau, Census 2000 Redistricting Data (PL 94-171) Summary File; Statewide Database (http://swdb.berkeley.edu)
*2000 Census Statistics are Dept. of Justice Recommended Categories;
Registration Statistics are based on the November, 2000 General Election
**Asian Registration = Korean + Japanese + Chinese + Asian Indian + Vietnamese + Filipino Surname Matches
***2000 API = 2000 DOJ Asian + 2000 DOJ Hawaiian




## Final CD 51
## ( Berman II - Previously CD 50 )
## AB 632 Passed Sept. 14, 2001
## AB 632 Signed Sept. 27, 2001

**District 51 Statistics (2000 Census)***

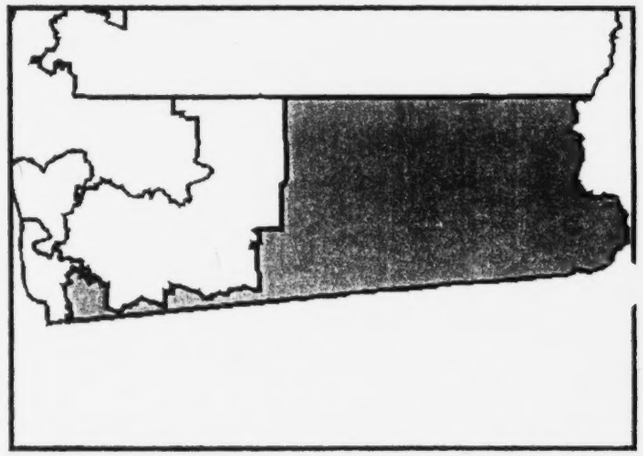
Latino Population: 340,452 (53.27%)
Latino Voting Age Population: 216,916 (48.99%)
Latino Registration: 100,093 (39.84%)

African-American Population: 61,680 (9.65%)
African-American Voting Age Population: 42,526 (9.60%)

Asian Population: 83,609 (13.08%)
Asian Voting Age Population: 61,149 (13.81%)
Asian Registration**: 14,487 (5.77%)

White Population: 135,931 (21.27%)
White Voting Age Population: 111,199 (25.11%)

Total Registration: 251,256
Democrat Registration: 121,864 (48.50%)
Republican Registration: 76,202 (30.33%)
Latino Percent of Democrat Registration: 57,871 (47.49%)



Data Source: US Census Bureau, Census 2000 Redistricting Data (PL 94-171) Summary File; Statewide Database (http://swdb.berkeley.edu)
*2000 Census Statistics are Dept. of Justice Recommended Categories;
Registration Statistics are based on the November, 2000 General Election
**Asian Registration = Korean + Japanese + Chinese + Asian Indian + Vietnamese + Filipino Surname Matches

## DECLARATION OF ANTONIO GONZALEZ

I, Antonio Gonzalez, declare as follows:

1. I have personal knowledge of the following facts. If called as a witness, I could and would testify competently to those facts.

2. I am the President of the William C. Velasquez Institute (WCVI), a national non-profit, non-partisan, research organization located in San Antonio, Texas and Los Angeles, California. I am also the President of the Southwest Voter Registration Education Project (SVREP), a non-profit, non-partisan voter registration organization, also located in San Antonio, Texas and Los Angeles, California. I have been President of both organizations since 1994. SVREP organizes dozens of voter registration drives throughout the United States each year.

3. The Senate released Senate redistricting plan on or about August 30, 2001. The Senate also released the Congressional redistricting plans on or about August 31, 2001. I reviewed the Senate and Congressional plans with my staff, Zachary Gonzales. Collectively, we were very dissatisfied with the outcome of the Senate and Congressional plan. In particular, I was concerned about how badly the Latino community had been divided in the San Fernando Valley.

4. In the proposed Congressional redistricting plan, the Latino community in the San Fernando Valley was cut almost in half. The Latino population had been cut to approximately 40 percent. I was concerned that Latinos in the San Fernando area would not be able to vote for candidates of their choice, since the community was split among different districts. I was also concerned about [sic]

that a potential Senate district in the Southeast Los Angeles area had not been created. There was adequate population to create a majority Latino district in the area.

5. I was particularly concerned about the division of the Latino community, because there is a relationship between the voting district, and voter participation. SVREP's mission is to protect the voting rights of the Latino and other minority communities, and to expand political participation. Voting rights violations damage SVREP's ability to enhance political participation. A district in which the Latino community's vote is diluted guarantees that their candidate of choice will not get elected. This in turn has a dampening effect on the participation of the Latino community in the political process. If a community sees that its candidate of choice can't win, it will be less likely to register, to vote, or to engage in campaigning activities.

6. The Senate adopted Assembly Bill 632 (AB 632) on or about September 12, 2001. The Assembly adopted AB 632 on or about September 13, 2001. On or about September 6, 2001, I had a private telephone conversations [sic] Congressman Howard Berman (Rep. Berman). During the course of this conversations [sic], Rep. Berman relayed the following information to me.

7. I told Rep. Berman that my primary concern was that the Latino Community in the San Fernando Valley was drastically divided between his districts and Rep. Sherman's district. I told him that Latinos in the area would not be able to elect candidates of their choice because they were split among different districts. Rep. Berman told me he thought the district was a good one. I

told Rep. Berman that the district was a big mistake, and it would trigger a lawsuit.

8. I told Rep. Berman that he should accept the changing demographics, and make minimal changes in the district. He should appeal to the Latino community on his record. I noted that there was a good chance he could be the candidate of choice in the Latino community, given his record on Latino issues. Rep. Berman told me that he did not agree with this assessment. Rep. Berman said that he was concerned that the current district caused him to be in competition with Latinos. Rep. Berman also said he was not ready to be pushed out, he said he was enthusiastic about his career, and he did not believe that Latinos would support him. Rep. Berman pointed to how Raul Godinez ran against him in 1998. Rep. Berman expressed disappointment with Godinez, and with the Mexican American Political Association (MAPA) who supported Godinez.

9. Rep. Berman said that he was upset that he had to raise and spend money to run in the district. He did not want to do that again. I pointed out that many Latino elected officials supported Rep. Berman, and he won easily. But Rep. Berman indicated he did not want to go through that kind of a race again. He also felt that he spent money in this district that would be better spent supporting Latino candidates elsewhere.

I suggested to Rep. Berman that he reunite the Latino community in the San Fernando Valley and place them in Congressman Brad Sherman's district. Rep. Berman told me he would think about the suggestion. (Later Michael Berman, Rep. Berman's brother, told me and others in a conference call, that they would not place the Latino

community in Rep. Sherman's district, saying "we won't do that to Sherman.")

10. Rep. Berman never mentioned as a reason for the configuration of his Congressional district, the need to include areas of Sherman Oaks, Studio City, Encino or a portion of the Santa Monica Mountains south of Mulholland Drive into his district. He never mentioned the need to regain areas he had represented prior to the creation of the Redistricting Plan prepared by the 1990 Special Masters to the California Supreme Court.

11. Rep. Berman never mentioned that more Latinos were included in the Congressional district represented by Congressman Brad Sherman (Rep. Sherman) because there was a need to encourage Rep. Sherman to take leadership on issues of concern to the Latino community.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of April, 2001, in Los Angeles, California.

/s/ Antonio Gonzalez
Antonia Gonzalez

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**DECLARATION OF XAVIER FLORES**

I, Xavier Flores, declare as follows:

1. I have personal knowledge of the following facts. If called as a witness, I could and would testify competently to those facts.

2. I am the Executive Director of Pueblo y Salud, a non-profit human services organization in the San Fernando Valley. I have been active in this community for about 16 years. Among other programs, our organization has sponsored about 26 voter registration drives over the years.

3. I was extremely upset when I saw the initial draft of the 2001 congressional districting plans for the San Fernando Valley seats. In my view, fracturing the San Fernando Valley Latino community threatens to thwart our organization's years of hard work in voter registration and political empowerment. I was shocked when I saw the gerrymandering that was so crude and obvious. They removed the heart of the Latino community in the Northeast San Fernando Valley and placed it in Brad Sherman's district. This area included our Pueblo y Salud offices in the City of San Fernando, Arleta, and Pacoima. Sylmar, Lake View Terrace and parts of Sun Valley were left in the separate district of Howard Berman.

4. On September 4, 2001, I received a telephone call in the evening at my office from Amadis Velez from MALDEF and Congressman Brad Sherman. Mr. Velez had previously informed me that he had spoken with Congressman Sherman the night before, and that he wanted a San Fernando community member to be present on the phone during a follow-up call with Congressman Sherman.

5. During this call, Congressman Sherman said that he was going to Sacramento the following day. He was very angry and spoke at length about the way that his district had been drawn by Michael Berman. He said that he had been "done in" and that he would not stand for it. He was worried that he had lost a significant share of his

constituents to Congressman Howard Berman, particularly large portions of Tarzana and Van Nuys. He said that, in their place, many Latinos from Congressman Berman's district had been drawn into his own district. These areas included the City of San Fernando, Arleta and Pacoima.

6. At some point in that conversation, he said that "This is what $20,000 gets me." I asked what he meant by that, and he responded that every single congressional representative had to put up $20,000 to pay Michael Berman to draw the seats.

7. During that conversation, both Mr. Velez and I asked Congressman Sherman whether he was intending to testify against the proposed maps, and he indicated that he was unsure, but was strongly considering doing so.

8. The following day, September 5, 2001, in the late morning, I received a call at my office. The call was from Mr. Velez, who was at the MALDEF office in Sacramento along with Congressman Sherman, one of his aides, and other MALDEF staff members.

9. Congressman Sherman told us that he hoped that we would mobilize and sue over the district lines. During this call, maps that Congressman Sherman said represented compromise proposals were described to me while they where being shown to the MALDEF staff.

10. During this conversation, we asked Congressman Sherman repeatedly whether he was going to testify against the proposed congressional plan. He told us that he would not testify. However, he told us that he wanted his conversations with Michael Berman and Howard Berman about redistricting to be placed on the legislative

record. I told him that he was asking for help from the Latino community in challenging Michael Berman's proposal, yet he was unwilling to help us by testifying against the plan. Congressman Sherman responded by stating, "I remain a coward". He told us that, if he testified, he thought Michael Berman would use it against him.

11. After a long pause, he then told us that Michael Berman had called him the evening before and had threatened that if he did not fall into line they were going to draw him an even worse district by adding even more Latino voters.

12. Congressman Sherman stated that Michael Berman could make it worse for him by moving all of the Lations in the northeast San Fernando Valley into Congressional District 24, his district. Congressman Sherman told us that Michael Berman could put him in a district with 37 percent Latino registered voters, and then say it was his own fault for not falling into line with the plan.

13. Congressman Sherman told us that Michael Berman told him that Berman and his team knew that the legislative plan for the Berman/Sherman districts had legal problems, but that they drew it like that to start Howard Berman's district with a very low Latino percentage by splitting the Latino vote, to then bargain up to a higher Latino percentage in one of the two districts.

14. Congressman Sherman also told us that Michael Berman told him that the only reason he had come out of retirement was to draw a map that protected his brother from a Latino challenge. Howard Berman was apparently afraid of a Latino running against him if the seat had kept its historical configuration. According to Congressman

Sherman, his aide also was present when Michael Berman made that statement.

15. Congressman Sherman also stated that he had recently spoken with Congressman Richard Gephardt, who told him that he was upset about the California congressional plan because he thought the Democrats were "taking a dive."

16. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

17. Executed in San Fernando, California on October 9, 2001.

/s/ Xavier Flores
XAVIER FLORES

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**Declaration of Assemblymember Juan Vargas**

My name is Juan Vargas. I have personal knowledge of the facts as stated in this declaration. If called upon to testify as a witness in this matter, I could and would competently testify to the facts set forth herein.

1. I represent the 79th District in the California State Assembly, which includes the southern part of the City of San Diego, the City of National City and part of the City of Chula Vista. I am serving my first term after being elected in the November 2000 general election. Prior to the above-mentioned election, I served on the San Diego City Council, representing the eighth district, since February 1993.

2. I was asked by the Mexican American Legal Defense and Educational Fund (MALDEF) to provide this

declaration of my personal knowledge relating to the 2001 legislature redistricting process.

3. As a member of the Assembly, during the legislative redistricting in 2001, I sat on a number of standing committees, including the Elections, Reapportionment and Constitutional Amendments Committee. Speaker Robert Hetzberg [sic] appointed me to the Redistricting Conference Committee on August 27, 2001. The Redistricting Conference Committee was created in an attempt to bring the two houses of the legislature to a consensus on the various proposals relating to the new district lines. There were six members of the Conference Committee: Speaker Hertzberg, Assemblymember Dave Cox, Senate President Pro Tempore John Burton, Senator Don Perata, Senator Jim Brulte and myself.

4. The Conference Committee never met publicly, never voted on any matter related to redistricting and never reached consensus on any of the various proposals. Due to my membership on this committee, I am familiar with the pre-2000 census district lines and the current district lines as passed by the legislature on September 13, 2001.

5. After being named to the Conference Committee, I was present in many meetings with consultants for the Assembly and Senate whose responsibility it was to draw the redistricting maps, including Michael Berman, Carl D'Agostino, Jim Wisley, Bill Cavala, and others.

6. On the Assembly Floor, I voted in favor of Senate Bill 802 (Committee), drafted by the Assembly consultants, which created the Assembly and Board of Equalization maps because, in my opinion, it followed the law and respected communities of interest.

7. On the Assembly Floor, I did not vote in favor of Assembly Bill 632 (Cedillo), drafted by the Senate consultants, which created the Senate and Congressional maps because, in my opinion, it intentionally divided Latino communities and disenfranchised voters in San Diego and the San Fernando Valley.

8. I objected then and object now to the newly-drawn Congressional seat held by Representative Bob Filner because the communities of Barrio Logan, Logan Heights, Golden Hill, Sherman Heights, Memorial, Grant Hill, Southcrest and Stockton, which are historically underserved and predominantly Latino, were in my opinion purposely cut out of the district to reduce Latino percentages relative to population, voting age population and voter registration.

9. Each of these communities, except Barrio Logan, were situated in the Fiftieth Congressional District represented by Bob Filner during the 1990s. Each of these communities are also united with other south San Diego communities in the San Diego City Council's eighth district and the San Diego County Board's first district. Prior to the passage of these two redistricting bills, all of the above-mentioned communities except Barrio Logan were united with those same south San Diego communities in the state's 79th Assembly District and the 40th Senatorial District. All of these communities, including Barrio Logan, are united with those same south San Diego communities in the post-redistricting 79th Assembly District and the 40th Senatorial District.

10. As a member of the redistricting conference committee, on several occasions, I voiced objection to the Senate's chief map-drawing consultant, Michael Berman,

about the exclusion of the Latino neighborhoods I described in paragraph eight from the post-redistricting Congressional District (CD) 51. Each of these neighborhoods were a part of the congressional district that was represented by Bob Filner during the 1990s. I understand that, under the federal court's ruling regarding legislative privilege, I cannot reveal the consultant's response.

11. In declining to vote in favor of the congressional district map that the state ultimately adopted, I was motivated by my understanding that purposeful racial discrimination had occurred in the drawing of districts in San Diego and in the San Fernando Valley. In both cases, I understood that efforts were made to split the Latino community geographically and dilute its voting power to ensure that the incumbent Democrats would not face a successful primary challenge by a candidate supported by the Latino community. Based on my understanding of the law as represented by the Assembly's legal counsel, I could not endorse these efforts.

12. With specific respect to CD 51, I understood that the final plan would not include a map that raised the Latino proportion in CD 51 above 40 percent of voter registration or above 50 percent of the voting age population because these thresholds were believed to represent a particular threat to the reelection prospects of the incumbent. It was my understanding that, as a result, the Latino neighborhoods that I mention in paragraph eight, were excluded from CD 51. It was also my understanding that the imperative not to exceed these thresholds stemmed in part from the incumbent's demand and his payment of a $20,000.00 retainer to the chief map-drawing consultant.

13. I believe that the Legislature as a whole was motivated to approve the maps submitted by the Senate's chief map-drawer after consultation with members of the legislative leadership including members of the conference committee. Except with regard to lines in a legislator's particular area of the state, the legislature as a whole was motivated to vote, on a tight schedule, in favor of the only plan that the leadership approved of and presented. In essence, then, the Legislature was motivated by protecting incumbency and each legislator's particular district. Additionally, the Legislature was faced with a lack of alternatives, each legislator understanding that no alternative maps would be presented and that their only option was to vote in favor of or against the map presented.

14. In this sense, the Legislature as a whole acted with whatever intentions the leadership had. In my opinion, then, the Legislature acted upon and was motivated by all of the information contained in paragraphs ten through thirteen of this declaration, including keeping CD 51 below the above-mentioned Latino thresholds. Thus, I believe that the Legislature acted with purposeful racial discrimination as a motivation in drawing and enacting congressional district lines in San Diego and in the San Fernando Valley.

I declare under penalty of perjury, that the foregoing is true to the best of my knowledge. Executed on April 22nd, 2002 in ~~San Diego~~ Sacramento, California.

/s/ Juan Vargas
Juan Vargas

## DECLARATION OF J. MORGAN KOUSSER

Credentials

1. I am a professor of history and social science at the California Institute of Technology. Educated at Princeton and Yale, I have been a visiting professor at Michigan, Harvard, Oxford, and Claremont. As my curriculum vitae, attached as Exhibit A, shows, I've published three books and edited another, in addition to 41 scholarly articles, 67 book reviews, and 14 entries in reference works. My work has focused on minority voting rights, educational discrimination, race relations, the legal history of all of the foregoing subjects, political history, and quantitative methods. My recent book, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, was co-winner of the annual Lillian Smith Award of the Southern Regional Council for the best book on the South and co-winner of the annual Ralph J. Bunche Award of the American Political Science Association for the best scholarly work in political science which explores the phenomenon of ethnic and cultural pluralism.

2. I have previously testified or consulted in 20 federal voting rights cases. Perhaps most significantly for the current case, I was the chief expert witness on the intent issue in *Garza v. Los Angeles County Board of Supervisors* and the chief expert witness for the Democrats in the 1992 challenge to the redistricting of California congressional seats. My report in *Garza* essentially served as the basis of Judge David Kenyon's opinion on the intent issue. In turn, that part of Judge Kenyon's opinion became the basis of the unanimous part of the Appeals Court's opinion, which the Supreme Court did not review. My report in the 1992 Democratic congressional delegation challenge became the basis for my 56-page scholarly article, "Reapportionment

Wars: Party, Race, and Redistricting in California, 1971-1992."

3. I have written extensively on the issue of intent, especially in voting rights cases. Indeed, the version of my *Garza* report which was expanded into a law review article was entitled "How to Determine Intent: Lessons from L.A." I have further expanded and deepened the intent part of that analysis in chapter 7 of *Colorblind Injustice*, "Intent and Effect in Law and History." In that chapter, I set forth, explain, and logically justify ten "intent factors" that can be used to organize inquiries into intent in voting rights cases systematically. Because I will draw on that analysis in this declaration, I append that chapter to this declaration as Exhibit B.

4. From the beginning of my career, in scholarly books and articles, as well as in legal testimony, I have written about and employed "ecological regression" analysis, which has been the chief statistical means of determining whether voting is racially polarized in Section 2 cases. I have recently completed a lengthy article examining issues in several models of ecological inference, including ecological regression, "neighborhood models," and Gary King's "EI."

My Role in the 2001 Redistricting

5. In the Spring of 2001, I was contacted by Denise Hulett of MALDEF to determine if I would like to play a role in that organization's efforts in connection with the 2001 redistricting in California. I agreed to do so for a fee of $175/hr and proposed to examine what I believed was likely to be the most interesting scholarly and policy question of the 2001 redistricting season: what it took to

elect a Latino in California in the 1990s. With the Latino population growing rapidly in many places across the country, California's experience might have much wider than local relevance. Shortly thereafter, I was contacted by Jonathan Steinberg, with whom I had worked in the 1992 Democratic congressional challenge, asking whether I might be available to work either for the Democratic party or the legislature (my memory is unclear) on the 2001 California redistricting. I told him that I had already agreed to work for MALDEF.

6. Over the next few months, with help from MALDEF in gathering, but not in interpreting data, I produced a report, "The Role of Cross-Over Districts in a Fair Redistricting: Lessons from the 1990s," which was included in MALDEF's submission of its redistricting plans to the California Assembly and Senate Committees. It is attached as Exhibit C to this declaration. I did not have a role in drawing any districts, although I did see and comment on parts of MALDEF's congressional plan before it was finalized. I also discussed my findings with MALDEF as my analysis proceeded. I did not see any of the legislature's official plans or MALDEF's Senate or Assembly plans before I finished my report. I do not remember commenting specifically or being asked to comment on MALDEF's version of either the Berman or Filner congressional districts.

7. Once the legislature's plans were passed, but before they were signed by Governor Davis, Ms. Hulett again called me and asked me to be an expert witness in MALDEF's expected litigation, both on intent and racial polarization issues. I agreed. Subsequently, Mr. Steinberg again contacted me to ask whether I might be available to

testify for the legislature. I again informed him that I had already agreed to work for MALDEF.

8. Since mid-September, MALDEF has provided me with various declarations, official documents, testimony from legislative hearings, election returns, ethnic data, maps, reprints of newspaper articles, and other documents. In addition, during the redistricting process, I attempted to follow on-line editions of major state newspapers fairly closely myself. The interpretations of all documents are mine alone.

## Purpose and Findings of the "Cross-Over Districts" Report

9. In my "Reapportionment Wars" paper and a companion paper in *Legislative Studies Quarterly*, I developed and tested statistical measures that would allow an observer who was not privy to the innumerable inside details of a redistricting process to assess the likely partisan and racial impacts of different reapportionment plans. In particular, I showed that a simple measure based on partisan registration would not only allow one to predict 88 percent of the California Assembly and congressional contests from 1970 through 1996, but also that it could predict what would happen if registration margins or partisan tides shifted – considerations crucial to anyone planning districts for a decade ahead. I also pioneered a graphical method to compare the partisan consequences of different plans simply.

10. In addition, in the "Reapportionment Wars" paper and a law review article on "influence districts" that grew out of the 1991 redistricting, I considered the consequences of various redistricting criteria for minority ethnic

groups. Two conclusions are especially relevant here: first, "bright line" criteria, such as a standard that would exclude from consideration under the Constitution or the Voting Rights Act any area in which minorities comprise less than 50% of the citizen voting age population, bear little relation to the political realities of electing candidates of the ethnic group's choice; and second, the minority group's percentage in a potential district matters, but what is often crucial is who *else* is in the district.

11. My "Cross-Over Districts" paper flows directly from these previous papers. Its purpose was to develop and test indexes of equal political opportunity for Latinos in contemporary California; such indexes, I believed from the beginning, would involve not only Latino percentages, but also the percentages of other partisan and ethnic groups.

12. Two facts were well known when I began – that the number of Latinos elected to the legislature and Congress from California, particularly to the Assembly, had grown dramatically over the decade of the 1990s, and that where Latinos comprised a majority of the voters, it was usually very easy for them to elect a candidate of choice. The interesting cases were districts in which Latinos made up smaller percentages. Had Anglo voters become sufficiently colorblind that it did not matter what the Latino proportion was? Or was the elected Latino increase simply a product of their increasing proportions in the population or a surge in Latino voter registration? What was the best index of Latino political opportunity – population, voting age population, registered voters, or the percentage of Democratic partisans, the party to which Latinos overwhelmingly adhered?

13. Analyzing all Assembly, State Senate, and congressional contests from 1994 through 2000, I concluded in the "Cross-Over Districts" report that:

A. The index that best differentiated Latino opportunities was not Latino population, voting age population, or overall registration, but **the Latino percentage of Democratic voters**.

1) In districts in which Latinos comprised 30 percent or fewer of the Democratic registrants, non-Latino candidates won almost 98 percent of the elections.

2) In districts in which Latinos made up 50 percent or more of the Democrats, Latino candidates won 90 percent of the elections.

3) In districts in which Latinos made up between 30 and 40 percent of the Democrats, Latino candidates won 19 percent of the elections.

4) In districts in which Latinos made up between 40 and 50 percent of the Democrats, Latino candidates won 46 percent of the elections.

B. Latinos needed a substantial plurality among registered Democrats to be elected in "cross-over" districts, that is, those where Latinos comprised between 30 and 50 percent of the Democrats.

1) The average margin of the Latino Democratic percentage minus the Anglo Democratic percentage in the 24 districts won by Latino Democrats was 11.2 percent.

2) The same figure in the 22 districts won by Anglo Democrats was 2.8 percent.

3) The margin for the two Latino cross-over districts won by Asian-Americans was 4.3 percent.

4) That margin in the 25 Latino cross-over districts won by Anglo Republicans was -9.2 percent – that is, in such districts, Anglos dominated the Democratic, as well as the Republican party.

C. But party mattered, too. Once Latino candidates got the Democratic nomination, they could generally count on support from enough of their fellow partisans of other ethnic groups to win, but it did not help to obtain the Democratic nomination in a district with a Republican registration advantage.

1) In the 24 cross-over districts won by Latinos, Democratic registrants outnumbered Republican registrants by an average of 24 percent.

2) In the 22 districts won by Anglos, the figure was 23 percent.

3) In the 2 districts won by Asians, the figure was 35 percent.

4) But in the 25 districts won by Anglo Republicans, the same figure was only 6 percent.

D. The 4 Assembly districts won by Latino Republicans actually had a smaller percentage of Latinos among Republican voters, as well as smaller percentages of Latino population, voting age population, and registered voters, than the average district in the state. Latino Republican victories are therefore impossible to predict from such statistics, and ethnic or party percentages offer no way to evaluate the effect of redistricting on Latino Republicans.

14. My "Cross-Over" report, which systematizes what savvy political consultants and observers have doubtlessly understood, facilitates an overview of the redistricting process as a whole, as well as a way to evaluate specific districts. As a follow-up on that report, I have appended to this declaration, as Exhibit D, an analysis of the plan of the 1990s, in comparison with MALDEF's published proposal and the plans that the legislature finally adopted.

## Preliminary Conclusions about the Overall Legislative Plan and the Three Challenged Districts

15. Overall, as the appended tables comparing the current, MALDEF, legislative proposed, and legislative final plans show, the legislature did not discriminate against Latinos as harshly as in some previous redistricting experiences. The Assembly plan seems largely unobjectionable. As the historian of African-American and poor white disfranchisement in the South in the late 19th and early 20th centuries, I use the word "disfranchisement" carefully, and I would not characterize the 2001 California redistricting plans as a whole as "disfranchisement" schemes. In fact, they do not approach the vote dilution of the infamous 1965 California redistricting, in which, for example, unincorporated East Los Angeles was sliced like a six-piece pie in order to shore up seats for white Democrats in the Assembly and prevent Latinos from being elected from the area. With 15 Latinos among the 50 Democrats in the Assembly and 7 among the 26 Democrats in the Senate, it would have been foolhardy for the redistricting leadership to ignore Latino interests entirely, and the leaders did not do so.

16. But what sticks out glaringly from the tables are the divergences between the current, MALDEF, and legislative final plans in two districts: the old 26th (now 28th) congressional district and the 27th state senate district. In the former 26th district, the proportion of Latino Democrats is 7.9 percent higher than the proportion of Anglo Democrats.[1] In the MALDEF plan, that percentage rose slightly, to 11.4 percent, which is approximately the statewide percentage in "cross-over district" seats won by Latino Democrats. But in the final legislative plan, the proportion of Latino Democrats is 22.3 percent LESS than the percentage of Anglo Democrats. In all three variants of this congressional district, Democrats hold overwhelming registration advantages, making this, short of a political earthquake, a very safe Democratic seat.

17. In the state senate, MALDEF created a 27th district in southern Los Angeles County in which Latinos comprised 46.2 percent of the Democrats and enjoyed a 27.6 percent plurality over Anglo Democrats. Latinos in the legislature's version of the same seat amounted to only 28.7 percent of the Democrats, 10.5 percentage points LESS than Anglos did. Both versions of the seat were overwhelmingly Democratic.

18. The legislature was well aware of the current and MALDEF plans and of strongly-expressed criticisms of its proposed 28th congressional and 27th senatorial districts when it adopted both as final plans.

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[1] See the Appendix of my "Cross-Over Districts" paper for an explanation of the estimate of Non-Hispanic Anglo and Non-Hispanic African-American Democrats.

19. The blatant numerical patterns and the demonstrable foreknowledge of charged discrimination in these districts by themselves create a strong *prima facie* case that they were adopted with a discriminatory intent. Abundant qualitative evidence, to be analyzed below, supports this conclusion.

20. The fact that MALDEF drew districts in the same general areas that appear just as compact, but gave Latino voters considerably better chances to elect candidates of their choice – as implied by my "Cross-Over" paper – indicates that the legislative plans for congressional district 28 and senatorial district 27 also had discriminatory effects. If the 28th congressional district follows statewide trends, a Latino candidate would have a realistic chance to win the district under the MALDEF plan, but virtually no chance at all of doing so under the plan that the legislature finally adopted. If the 27th state senate district even comes close to duplicating the pattern of the rest of the state, the opportunities for a Latino to be elected under the MALDEF plan are very high, while under the legislature's plan, they are diminishingly small. Qualitative and preliminary quantitative information supports these conclusions.

21. Although my calculations indicate that there was no discriminatory effect in the drawing of congressional district 51 (old 50), in which the legislature allowed Latinos a 28.7 percent plurality over Anglos, there is qualitative evidence that the lines were drawn with a discriminatory intent.

Discriminatory Intent In the Drawing of Congressional Districts 28 and 51

22. Rather than reiterate what I wrote in *Colorblind Injustice* to explain and justify ten "intent factors," I will simply refer the reader to the chapter, attached as exhibit B. I will, however, use the factors to organize my more detailed inquiry into the evidence. The first factor is **models of human behavior**, which inevitably affect the way we approach and interpret evidence, and often crucially, how we fill in the blanks in the evidentiary record. Do those who redistrict legislative or administrative bodies generally ignore such considerations as race and ethnicity, political partisanship and incumbency, friendship and family ties, and pressures from various interest groups in favor of such civics textbook ideals as drawing compact, tidy districts and encouraging vigorous competition in each district?

23. In this instance, we do not have to resort to the general literature of political science, the familiar pronouncements of such judges as Justice White in *Gaffney v. Cummings*, 412 U.S. 749, 753 (1973), or even common sense. For my "Reapportionment Wars" paper examines the California redistricting experience directly, including the 1980s and 1990s, years in which Michael Berman, the principal architect of the 2001 senate and congressional plans, was the major drawer of congressional and other plans for Southern California. One of the chief conclusions of that paper is that in 1981, Berman and the late Rep. Philip Burton devoted extraordinary energy to drawing congressional districts for then-Congressman John Burton and then-Assemblyman Howard Berman, as well as for several of their personal friends and allies. So concerned were they to make those seats safe that they packed them

with Democrats, endangering other Democratic seats (including Phil Burton's!) to do so. When I presented this paper at Daniel Lowenstein's UCLA Law School class on election law, Michael Berman, the commentator on the paper, seemed satisfied that I had not distorted his role or motives.

24. In this case, therefore, we can proceed with the most specific possible model of human behavior. In previous instances of redistricting in California, Michael Berman has very skillfully protected the interest of his family and friends first and his partisan allies next. Blunt and admirably scornful of hypocrisy, Michael Berman has engaged in little of the conventional "good government" posturing, which so often represents a transparent effort to hide more self-interested motives.

25. The second factor is the **historical context**. In addition to documenting the increases in Latino elected officials and demonstrating that this came about overwhelmingly in districts in which Latinos comprised 40 percent or more of Democratic voters, my "cross-over districts" paper gives one statistic that is particularly pertinent here. While the Latino proportion of the general population grew by only *13.2* percent from 1994 to 2000, the Latino proportion of Democratic registrants increased by *37.3* percent over the same six years (p.8). This trend was especially marked in former congressional districts 26 and 50, as is shown most easily in a table:

| 1990s District | Percent of Democratic Registrants Who Are Latino | | | |
|---|---|---|---|---|
| | Year | | | |
| | 1994 | 1996 | 1998 | 2000 |
| 26 | 26.2 | 37.5 | 41.5 | 44.7 |
| 50 | 28.3 | 41.3 | 38.8 | 40.1 |

Thus, while the statewide percentage of Democrats who were Latino grew by a little more than a third, to 22.1 percent, that in former district 26 grew by 70.6 percent, to 44.7 percent. The same percentage in former district 50 grew by 41.7 percent. It is no wonder that Latino candidates were attracted or that Anglo incumbents were made uneasy by such changes.

26. In fact, in 1996, Rep. Bob Filner of former district 50 faced a challenge from serious Latino candidate, Juan Vargas, in the Democratic primary, and in 1998, Rep. Howard Berman attracted a similar challenge from San Fernando Mayor Raul Godinez. In addition, in old state senate district 20, which overlapped with the old 26th congressional district, there was a particularly nasty open seat primary between Anglo and Latino candidates in 1998.

27. The 1996 Filner/Vargas race was expensive and brutal. As the *Californic Journal* (May, 1996, p. 22) put it: "The road to renomination was anything but smooth for two-term Democrat Bob Filner, as he and San Diego City Councilman Juan Vargas engaged in an aggressive and, at times, nasty primary campaign." Filner won by only 54 percent to Vargas's 46 percent.

28. Rep. Howard Berman's 1998 contest was not as close, as he beat Godinez by 66-33, but after Berman coasted to reelection in the general election, where he did not even have Republican opposition, the *California Journal* (December, 1998, p. 21) commented that in the primary, "Godinez did well enough to tickle the interest of local Latino leaders. They will doubtless be looking for redistricting to carve out something a little more favorable to a Latino candidate in anticipation of Berman's eventual departure from the scene."

29. The 1998 20th senate district primary between former Democratic Assembly leader Richard Katz, who had been forced out of the lower house by term limits, and Los Angeles City Councilman Richard Alarcon, backed by state senator Richard Polanco and the senate Latino Caucus, was, in the *California Journal*'s words, "nasty, brutish, and expensive." (May, 1998, p. 37) Although no issue differences divided the candidates, and although some important Latinc politicians, such as City Councilman Tony Cardenas, endorsed Katz, the contest was decided by a huge turnout in what the *Journal* (July, 1998, p. 41) called "the heavily Latino half of the district." After Alarcon sent out a mailer associating the liberal Katz with Republican Gov. Pete Wilson and an infamous 1988 incident in which Orange County Republicans hired poll guards to intimidate Latino voters, Katz charged Alarcon's campaign with "race baiting." Alarcon won by 29 votes out of 42,432 cast.

30. Thus, the very specific historical context of the redistricting for these two seats saw massive increases in the proportion of Latinos among Democratic voters and divisive campaigns waged by Latino challengers. It would be surprising, indeed, if the Anglo incumbents did not look

to friendly redistricters to shore up their political fortunes or at least not further undermine them.

31. The third factor is **the text of the law or the lines of the districts**. Although generally, the text of a redistricting law is of little consequence, it has one here. The California legislature redistricts four bodies: the Assembly, the Senate, Congress, and the Board of Equalization. Since as numerous newspapers reported[2], these plans carefully preserved the partisan status quo in each body and dislodged few incumbents, they enjoyed widespread support, eventually passing with the votes of more than two-thirds of the members of each body of the state legislature. One would have thought, therefore, that the plans could be placed in either a single bill or four separate bills, for there was no advantage in constructing any sort of log-roll. But in fact, the Assembly and Equalization plans were voted on in one bill and the Senate and congressional plans in another.

32. The reason for this, according to Assemblyman Juan Vargas, a member of the Senate-Assembly Conference Committee on Redistricting, was that Assembly Speaker

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[2] For a small sampling, see Carl Ingram, "Democrats Have Luck of Draw in Redistricting," *Los Angeles Times*, Aug. 19, 2001, B7; John Howard and Hanh Kim Quach, "New maps lead to the status quo: Assembly Democrats keep 50-30 edge while making few changes in O.C." *The Orange County Register*, Aug. 30, 2001; Carl Ingram, "Plan to Redraw Districts Passes – Politics: Lawmakers approve a redistricting package designed to maintain the partisan status quo for 10 years in the Legislature and in the House delegation from California," *Los Angeles Times*, Sept. 14, 2001, B8; Dan Walters, "As Republicans rejoice, some Democrats glum over redistricting," *Sacramento Bee*, Sept. 17, 2001.

Bob Hertzberg and Assembly line-drawers Bill Cavala and Jim Wisely were concerned about possible voting rights violations in the 28th and 51st congressional districts as drawn in the final legislative plan. By Vargas's account, Hertzberg argued that the plans should be separated "so that the legal problems related to the Senate-drawn Congressional maps would not affect the Assembly maps."[3] That is to say, the shape of the bills in this case indicates both an opinion by important decision makers that the districts might be illegal and foreknowledge of the legal consequences of going ahead.

33. The shape of the lines is also significant. The 1991 Special Masters' plan for congressional district 26 is fairly neat and tidy, and the cities of San Fernando and Pacoima are in the heart of the district and well within its borders. The original MALDEF plan quite closely tracks the 1991 plan. But the first legislative proposal drawn by Michael Berman sliced San Fernando, Pacoima, and Panorama City out of the 26th (new 28th) district and moved them into the adjacent 24th (new 27th). As unsubtle demographically as it was cartographically, this excision reduced the Latino percentage of Democratic voters from 44.5 percent to 21.6 percent. It is quite possible, as Xavier Flores's declaration (pp.3-4) states, that this removal of the most important center of Latino population in the 28th district was a bargaining maneuver, and that Michael and Howard Berman planned to "bargain up to a higher Latino percentage in one of the two districts" [the 27th or 28th]. Whatever its tactical motivation, the initial fracturing of

[3] Vargas Declaration, p. 6.

the Latino community in the 28th congressional district for no apparent geographical, partisan, or community of interest reason provides an important indication of the intent of the framers of the eventually accepted plan.

34. The maneuvering regarding the lines of congressional district 51 was more complicated. As initially proposed and posted on the Assembly website on Aug. 31, the district was wholly within San Diego County. 32.9 percent of its registered voters were Latino. Although the website did not list ethnic registration by party, other statistics indicate that the percentage of *Democrats* who were Latino in such a district might range from 37.8 to 39.2 percent.[4] The voting age population was 43.8 percent Latino. Bargaining ensued, and the next proposal, posted on the Assembly website on Sept. 10, 2001, but never voted on, cut 142,000 San Diego county voters out of the district and added all of largely rural Imperial County to it. The proportion of Latinos among Democrats in this proposal was between 46 and 47.6 percent, and the voting age population that was Latino was 51.9. According to Juan Vargas, this second proposal was drawn by Messrs. Wisely and Cavallo, and its Latino registration and voting age population percentages were unacceptably high to Rep. Filner. At this point, Michael Berman came back with the final plan, which

[4] Statistics taken from the Statewide Database for the 1991, MALDEF, and final legislative plans indicate that in [sic] for the 2000 election, the Latino percentage of Democrats was from 1.15 to 1.19 times as high as the Latino percentage of all registered voters in the 50th (new 51st) congressional district. To get the percentages of Latino Democrats given in the text above, I merely multiplied the percentage of overall Latino registrants on the Assembly web page by those two ratios.

kept all of Imperial County, but swapped areas within San Diego County, significantly, by cutting out of the district the largely Latino unincorporated communities of Barrio Logan, Logan Heights, Golden Hill, Sherman Heights, Memorial, Grant Hill, Southcrest, and Stockton. While this swap had only a marginal effect on the Latino proportion of Democrats in the district, it reduced the Latino percentage of registered voters just below 40 percent and that of the voting age population a percentage point below 50 percent – thresholds which Vargas's declaration says had become magic numbers for Michael Berman and Bob Filner.[5] Although the line and percentage changes were not as egregious as those in the 26th/28th district, they are still indicative of an overriding concern with ethnic concentrations in the 50th/51st district.

35. There is one other facet of district lines that bears on the intent of the legislature: the lines not seen. According to Juan Vargas's declaration, p.3, Assembly consultants Jim Wisely and Bill Cavala drew districts for both the Senate and Congress, and they "threatened to release the Assembly-drawn Senate and Congressional maps publicly." In fact, as pointed out above, they did post their map for the 51st congressional district on the Assembly web page, and according to Vargas, the Assembly-drawn map of the 26th (28th) congressional district essentially maintained the Latino percentages of registration and population. Had the legislature really been as interested as it often maintained in a fair and open process, and one that

[5] Vargas Declaration, pp. 5-6.

gave minorities an equal chance to affect the final disposition of the lines, it could have posted the complete alternative plans for the Senate and Congress drawn by the Assembly consultants, and it could have allowed a vote on those, the MALDEF, and the Coalition of Asian Pacific Americans for Fair Redistricting plans. The existence of the Assembly-drawn map of district 51, taken from the Assembly web page, bolsters Vargas's claims.

36. Since the fourth and fifth factors, **demographic facts** and **the climate of racial politics**, have already been treated extensively, I will pass on to the sixth, **the background of key decision makers**. Unlike the case with legislators in the Deep South, at least in past years, there is nothing to indicate that the key framers of these districts – Representatives Howard Berman and Bob Filner, chief line drawer Michael Berman, Senator Don Perata, chair of the Senate Reapportionment Committee, and the others in the legislative leadership – were at all tinged by racism or harbored any racial hostility whatsoever toward Latinos, African-Americans, Asian Americans, or any other group. If it were necessary for a historian to prove that someone was racially hostile in order to conclude that they acted with an intent to discriminate, then there would be few such conclusions. Even slaveholders, disfranchisers, and segregationists purported to act from beneficent motives,[6] and few people in public life could be further from that deplorable heritage than the group that drew the California districts in 2001.

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[6] For examples and much more discussion of this "racial hostility" criterion, see *Colorblind Injustice*, 128, 133-34, 327.

37. But what their backgrounds did show was a staunch desire, necessary and virtually universal among successful politicians, to maintain their own and their allies' personal power. As my "Reapportionment Wars" paper shows, the Bermans drew districts for themselves and for their comrades and raised and distributed money to foster their own and their collaborators' careers. As I have demonstrated above, both Representatives Filner and Berman fought hard, even bitterly to maintain their hold on offices. Just as liberal Los Angeles County Supervisor Ed Edelman, as I showed in my report in the *Garza* case, acted to insure, by careful redistricting, that the Latino percentage in his district did not get high enough to threaten his reelection, so the 2001 redistricters were prepared, their records showed, to counter whatever influences threatened them.

38. The seventh factor is **other actions of key decision makers**. Under this rubric should be placed the potential suggestion that in drawing the districts to protect Representatives Berman and Filner, the line drawers were only applying to their districts the general pattern of the whole redistricting – protecting incumbents. There are three problems with such an interpretation: First, even if it were true, doing so by deliberately disadvantaging a minority group that has never enjoyed equal power in redistricting, and by manipulating the percentage of that group's voters, would be unfair and presumably would violate the Voting Rights Act and/or the Constitution. To allow such actions taken to preserve the careers of racially benevolent politicians would mean that one would have to bless similar acts of self-preservation at the expense of minorities perpetuated by racially malevolent politicians. If "stacking" the percentages of minorities in districts below

certain thresholds is legal or excusable for progressives, it must be legal or excusable for reactionaries, and even for racists. Second, the widely-advertised deal that preserved the political status quo concerned the *partisan* status quo, not incumbents *per se*. Indeed, in a state with short term limits – 6 years in the Assembly and 8 years in the Senate, which also produces more congressional aspirants among "termed out" legislators – bolstering incumbency is not generally possible. Seats in the Assembly and Senate can be made safe for one party or another, and they can be designed for particular people who desire to jump from one house to the other, but they cannot be shaped for long-term incumbents. Third, even in congressional seats, where it is possible to design seats for incumbents, the designers only inconsistently protected incumbents. In southern Los Angeles County, they collapsed the district of moderate Republican Steven Horn, who promptly announced his intention to retire. In the Central Valley, they added liberal Democratic voters to the seat now occupied by the scandal-damaged Gary Condit, making Condit's renomination much more difficult, should he run, even though they made it easier for Democrats to hold the seat should Condit retire. In the Bay Area, they buttressed the Democratic registration percentage in the seat occupied by middle-of-the-road Democrat Ellen Tauscher, who complained that she might have to face a primary fight from a more liberal Democrat.[7] The redistricters did not protect

[7] David Broder column, *Washington Post*, Aug. 31, 2001, p. A2; Andrew LaMar, "Tauscher criticized for dislike of Democrats' redistrict plan – Legislators puzzled by colleague's position on change in constituency," *Contra Costa Times*, Aug. 24, 2001; Carl Ingram, "New Lines May Hurt Condit's Chances; Redistricting: Plans to be put forth in the state

(Continued on following page)

incumbents as much as they protected the partisan balance; and among incumbents, they picked and chose whom to protect and whom to threaten to displace.

39. The eighth factor is **statements by important participants**. Here, there is a difficulty, because redistricting is typically a private process, and public statements on the subject by those who have won are often patently disingenuous and uninformative. In this case, however, we have reports by people who were inside the process of statements made *in camera*. In many instances, other people were said to have heard the same statements, which will provide a partial check, as the judicial process proceeds, of the validity of the declarants' memories. Thus, Juan Vargas states that Michael Berman told him that "I cannot put too many Hispanics in that district [the 51st] or you will beat Bob [Filner]. . . . I have a fiduciary responsibility to Filner to draw a district where he won't lose to you or a Hispanic in the primary. Filner won't survive a primary to a Hispanic if I put him in Imperial County. . . . We have to divide Hispanics; Filner won't survive otherwise." Vargas contends that Berman made similar statements in front of political consultants Carl D'Agostino, Jim Wisely, and Bill Cavala, Assembly Speaker Bob Hertzberg, and many other people.[8]

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senate would add liberal voters to the area represented by the conservative Democrat," *Los Angeles Times*, Aug. 341, [sic] 2001, p. B10; Sam McManis, "Tauscher may lose her heart – Colleagues propose to redraw her district," *San Francisco Chronicle*, Aug. 30, 2001; Greg Lucas, "Legislative redistricting could hurt Condit, Tauscher," *San Francisco Chronicle*, Sept. 3, 2001; "The Politics of Map-Making," *Los Angeles Times*, Sept. 7, 2001, p. B14.

[8] Vargas Declaration, pp. 4-5.

40. Xavier Flores's declaration asserts that Rep. Brad Sherman of the 24th congressional district told him that he had wanted to testify against the plan, but that Michael Berman had threatened to put more Latinos in Sherman's district if he did so. There is some confirmatory evidence of part of Flores's account. At the Assembly Reapportionment Committee hearing on the legislature's plans on Sept. 5, 2001, Chairman John Longville kept asking "Has Congressman Sherman come in yet? Is Congressman Brad Sherman in the room? . . . Let me double-check one more time to make sure that Congressman Sherman has not arrived."[9] Obviously, Longville, an insider, expected Sherman to testify, and obviously, Sherman would testify in opposition to the plan. Otherwise, why bother to come to Sacramento? Even more tellingly, Flores declared that "Congressman Sherman also told us that Michael Berman told him that the only reason he had come out of retirement was to draw a map that protected his brother from a Latino challenge. Howard Berman was apparently afraid of a Latino running against him if the seat had kept its historical configuration." (pp. 3-4) Sherman may be able to corroborate Flores's account during this litigation.

41. Antonio Gonzales declared (pp. 2-3) that in a teleconference with Amadis Velez and Steven Ochoa of MALDEF, Sandi Polka of Senate Speaker John Burton's office, Carl D'Agostino, Denise Hulett, and others, Michael Berman characterized the opposition vote for Raul Godinez against Howard Berman in the 1998 primary as "an ethno-centric

[9] Transcript of Joint Assembly and Senate Reapportionment Committee Hearings, Sept. 5, 2001, 336, 344.

vote, not a polarized vote" – an indication of ethnically polarized voting, whatever the motive. As an explanation of why he had shifted Latinos out of district 28, Michael Berman announced, in Gonzales's summary, that "we don't want Howard working on district maintenance at home when he could be frying better fish in DC." No partisan or community of interest or other conventional districting explanation was offered.

42. All of these statements strongly support the view that Latino voters were shifted out of districts 28 and 51 in order to maintain Representatives Berman and Filner in office, and that both feared that if this were not done, they would lose or at least have to work much harder on constituency service tasks in order to be reelected.

43. The ninth factor is **state policies and institutional rules**. The apparent objectives and obvious manipulation of racial enclaves in these two cases undermines the stated rules for redistricting of the Assembly and Senate Committees on Reapportionment. On its homepage, the Senate Committee listed five substantive guidelines for the submission of plans. The last read "Submitted plans will be evaluated on their adherence to these two legal guidelines: a) Section 2 of the Voting Rights Act prohibits districts that, by intent and effect, cancel out or minimize the voting strength of racial groups; b) The Fourteenth Amendment generally prohibits plans or districts that are based on racial considerations without regard to other valid statewide redistricting standards." The second point, after population equality, in the Assembly's guidelines, as laid out in a general letter from Chairman John Longville, required "Compliance with requirements of the U.S. Constitution and the Voting Rights Act prohibiting race discrimination." Although the Senate guidelines were

more explicit and stronger than those of the Assembly, the latter body did a better job of complying with them. There were no mentions in any of the guidelines of protecting incumbents or of partisan considerations. Nothing in state policy justified the drawing of districts 28 and 51 as they were drawn.

44. The final factor is **impact**. While the 51st district, by the statewide experience documented in my "Cross-Over Districts" paper, does offer Latinos a good opportunity to elect a candidate of choice, the 28th district, by the same criterion, does not. In 2000, only one of the 172 California districts in the Assembly, Senate, and Congress had as low a proportion of Latinos to Anglos as the 28th in the legislature's final plan and still elected a Latino Democrat. And that member of the Assembly did not have to run against as formidable an incumbent as Rep. Howard Berman.

45. The evidence arrayed under the ten rubrics makes a formidable case for a racially-tinged intent in the drawing of the 28th and 51st districts, but what of opposing hypotheses, other potential explanations? It is notable that few have been offered so far, and it is easy to see why. To capture more Anglo voters to make up for the Latinos shifted to the 27th district, the 28th had to sprawl south and east, creating a notably less tidy shape than MALDEF's proposal. Filner's San Diego/Imperial County configuration is also no more compact than MALDEF's suggestion, and by leaving out several Latino neighborhoods that were together in other plans and in districts for other legislative bodies, the final plan for the 51st cannot be said to preserve communities of interest more adequately than its alternatives. Cities and neighborhoods within metropolises are split in both plans. None of these conventional criteria for districts provides a reason for

choosing the legislature's plan over any competing alternatives.

46. But it is possible that one could defend the shift of Latinos from Berman's to Sherman's district on partisan grounds. Sherman's seat was less safely Democratic, and perhaps in California, Latinos were more loyal Democratic voters than Anglos, just as in North Carolina, the state asserted that African-Americans were more loyal Democrats than whites were. The U.S. Supreme Court accepted North Carolina's assertion in *Easley v. Cromartie*, and it finally validated the 1990s redistricting as a partisan, rather than a racial gerrymander, because race was only used as a proxy for loyal Democratic partisanship. The only difficulty with this plausible explanation is that the facts do not support it. This is most easily shown in a two-part table.

## Partisanship or Ethnicity? A Comparison of Plan Swaps Between Berman and Sherman Under Two Plans

| Ethnic Variable | *From* Berman *To* Sherman | | *From* Sherman *to* Berman | |
|---|---|---|---|---|
| | MALDEF Plan | Senate Plan | MALDEF Plan | Senate Plan |
| **Panel A: Ethnicity** | | | | |
| Latino VAP | 33,037 (15.7%) | 65, 859 (33.8%) | 129,589 (76.6%) | 124,147 (69.6%) |
| White VAP | 143,766 (68.3%) | 96,610 (49.6%) | 18,953 (11.2%) | 33,810 (18.9%) |
| Black VAP | 8,650 (4.1%) | 8,594 (4.4%) | 6,213 (3.7%) | 6,091 (3.4%) |
| Asian VAP | 17,715 (8.4%) | 17,475 (9%) | 11,881 (7%) | 11,462 (6.4%) |
| Latino Registration | 13,920 (9.1%) | 23,633 (19.2%) | 39,504 (58.5%) | 37,388 (46.9%) |
| Latino Democratic Registration | 8,112 (10.4%) | 14,432 (24.6%) | 27,918 (64.1%) | 26,416 (52.6%) |
| Asian Democratic Registration | 2856 (3.7%) | 2661 (4.5%) | 1730 (4%) | 1777 (3.5%) |
| Estimated White Democratic Registration | (81%) | (65.1%) | (24%) | (37.2%) |

| Year, Office | *From* Berman *To* Sherman | | *From* Sherman *to* Berman | |
|---|---|---|---|---|
| | MALDEF Plan | Senate Plan | MALDEF Plan | Senate Plan |
| **Panel B: Partisanship** (Percent Democratic of Two-Party Vote or Registration) | | | | |
| 1992 Congress | 63.5 | 53.2 | 71.2 | 71.9 |
| 1994 Congress | 58.3 | 49.3 | 71.6 | 70.2 |
| 1996 Congress | 61.5 | 52.6 | 76 | 73.8 |
| 1998 Congress | 63.8 | 58.6 | 99.8 | 91.4 |
| 2000 Congress | 71.3 | 67.5 | 99.9 | 93.5 |
| 2000 President | 67.9 | 60.5 | 77.8 | 77 |
| 2000 Registration | 63.6 | 58.8 | 78.7 | 76 |

47. Panel A shows that MALDEF's counter-proposal after the first legislative plan was unveiled shifted 16 percent more white Democrats and 14 percent fewer Latino Democrats from Berman to Sherman than the Senate's plan did. Conversely, MALDEF took 13 percent fewer white Democrats and 11.5 percent more Latino Democrats from Sherman than the Senate plan did. It was an ethnic swap. Was it a partisan one? As Panel B demonstrates, the MALDEF plan actually gave Sherman 5 percent more Democratic registrants than the Senate plan did, and that they were equally loyal in their voting patterns. In 1994, a bad year for the Democrats, the ratio of Democratic votes for Congress to 2000 Democratic registration was 92 percent for the voters that MALDEF shifted to Sherman, while it was 83.8 percent for the Senate plan's voters. In 1998, a very good Democratic year, the same ratio was essentially 100 percent for both plan's voters. Under both plans, the voters shifted from Sherman to Berman were more Democratic in registration and voting patterns than those shifted the other way, and they were nearly equally so. If the legislature had been desirous of shoring up Sherman's district for the Democrats, it should have adopted the MALDEF plan. A partisan motive in this case cannot substitute for a racial one.

47a. A similar table can be compiled for the amendments proposed by MALDEF, the Assembly consultants, and the final legislative plan for the 51st and 53rd congressional districts, now occupied by Representatives Bob Filner and Susan Davis. The 53rd (former 49th) had been very competitive throughout the 1990s, before finally being wrested from Republican incumbent Brian Bilbray by Democratic challenger Susan Davis in 2000. It was widely

assumed that the Democrats who controlled the redistricting process would try to strengthen Democratic support in the Davis district. It is possible, therefore, that the Senate's amendments proposed to the initial legislative plan of Aug. 31 were chosen over the MALDEF and Assembly plans (which were never actually voted on by either house of the legislature) because the Senate plan offered Davis more Democratic voters, and especially more reliable Democratic voters. The next table shows that that was not the case.

## Partisanship or Ethnicity II. A Comparison of Plan Swaps Between Filner and Davis Under Two Plans

| Ethnic Variable | *From* Filner *To* Davis | | | *From* Davis *to* Filner | | |
|---|---|---|---|---|---|---|
| | MALDEF Plan | Assembly Plan | Senate Plan | MALDEF Plan | Assembly Plan | Senate Plan |
| **Panel A: Ethnicity** | | | | | | |
| Latino VAP | 29.4 | 33.8 | 49.1 | 69.1 | 55.4 | 67 |
| White VAP | 29.9 | 27.4 | 27.7 | 21.8 | 33.5 | 21.8 |
| Black VAP | 15.6 | 15 | 11 | 4.4 | 5 | 6.1 |
| Asian VAP | 20.6 | 19.4 | 8.7 | 2.8 | 3.6 | 3.1 |
| Latino Registration | 21.5 | 23.9 | 26.9 | 55.9 | 42.9 | 53.7 |
| Latino Democratic Registration | 22.9 | 26 | 31.5 | 68.5 | 57.7 | 65 |
| Asian Democratic Registration | 5.1 | 5 | 3.2 | 2.7 | 2.6 | 2.7 |
| Estimated White Democratic Registration | (25.7) | (24.5) | (29.8) | (17) | (26.2) | (16.3) |

| Year, Office | *From* Filner *To* Davis | | | *From* Davis *to* Filner | | |
|---|---|---|---|---|---|---|
| | MALDEF Plan | Assembly Plan | Senate Plan | MALDEF Plan | Assembly Plan | Senate Plan |
| **Panel B: Partisanship (Percent Democratic of Two-Party Vote or Registration)** | | | | | | |
| 1992 Congress | 64.5 | 65.6 | 65.3 | 63.8 | 53.4 | 70.4 |
| 1994 Congress | 56.4 | 58.1 | 56.4 | 41 | 39.3 | 43.2 |
| 1996 Congress | 61.2 | 63.1 | 62.2 | 46.6 | 43.2 | 48.6 |
| 1998 Congress | 69.8 | 76.2 | 66.2 | 15.2 | 22.5 | 20.9 |
| 2000 Congress | 64 | 66.1 | 64.7 | 47.6 | 44.2 | 50.1 |
| 2000 President | 61.2 | 62.2 | 65.8 | 57.4 | 53.4 | 58.8 |
| 2000 Registration | 47.2 | 47.7 | 49.6 | 52.6 | 46.9 | 53.2 |

47b. Panel A of the table shows that the Senate plan shifted nearly 20 percentage points more Latinos of voting age from Filner to Davis than the MALDEF plan did, and 15 percentage points more than the Assembly plan did. It shifted 5.4 percentage points more of Latino registrants than the MALDEF plan, and 3 percentage points more than the Assembly plan. And most tellingly, it shifted 8.6 percentage points more Latino Democrats than the MALDEF plan, and 5.5 percentage points more than the Assembly plan from Filner to Davis. The Assembly plan moved considerably smaller proportions of Latino adults, registrants, and Democratic registrants the other way – from Davis to Filner – than the Senate or MALDEF plans, which were essentially similar to each other in that respect.

47c. Panel B of the table shows that both the MALDEF and Senate plans shifted higher proportions of Democratic registrants from Davis to Filner than the other way around. They both slightly *weakened* Davis, instead of *strengthening* her against Republican opponents. And there is little to choose between any of the plans in regard to party fealty. As a percentage of Democratic party registration in 2000 (which was no doubt somewhat different in earlier years), the Democratic percentages for Congress vary from year to year, but not systematically from plan to plan. Like the Berman/Sherman table, the Filner/Davis table offers considerable support for the proposition that ethnic, but not partisan factors underlay the choice of the final legislative plan.

Discriminatory Effects – Section 2

48. The fact that the proposed MALDEF 28th congressional and 27th senatorial districts appear reasonably compact and that Latinos enjoy majorities of the voting age population in both makes clear that districts can be drawn in which Latinos will have an opportunity to win. Since the citizen voting age population figures have not yet been released by the Census Bureau, and since there is no reliable way to estimate citizenship in all precincts in the country without such figures, voting age population will have to do. I would argue, however, that a more practical measure of the potential of Latino political influence in California in the coming decade is based on the experience of the last decade, as summed up in my "Cross-Over Districts" paper. Political conditions vary over space and time. In Mississippi in the 1970s, expert witnesses contended and courts accepted the rule of thumb that to elect an African-American candidate, a district needed to be 65 percent black, because blacks were younger, registered at lower rates, and voted at lower rates than whites did. Applied to California today, the "65 percent" rule would pack blacks into districts in much higher numbers than necessary, robbing them of political power in adjacent districts. If equal political opportunity is to be real, it needs to be tied to real and sometimes changing political conditions. If one compares the experiences of all California districts from 1994 to 2000 in which Latinos comprised between 30 percent and 50 percent of the Democrats with the 28th congressional and 27th senatorial districts in the MALDEF plan, it is clear that a Latino Democrat would have an excellent chance to be elected in the 27th and a realistic chance in the 28th, on average.

49. The evidence of racial polarization in these districts is currently only partial for two reasons: First, in legislative districts that overlapped the areas in which the 28th congressional and 27th senatorial districts are located, there were few Latino/non-Latino contests in the most relevant contests, the Democratic primaries. As the "Cross-Over Districts" paper shows, few Latinos contest overwhelmingly Anglo districts, presumably because they realize that their chances are so small. Conversely, in overwhelmingly Latino districts, few Anglos seriously contest Democratic primaries, no doubt for the same reason. This pattern both explains the lack of contests useful to examine whether racially polarized voting exists and demonstrates that political aspirants believe that it exists. Second, the Statewide Data Base does not contain all the relevant data. Primary data for 1998 is not yet linked with census data, and the Data Base has not received funding to link such data for primaries before 1998. I hope to perform more complete ecological regression analyses as soon as more data becomes available.

50. There is some information, however. First, the *Garza* court found that voting in Los Angeles County was racially polarized. Second, the pattern of electoral success and ethnic percentages demonstrated in my "Cross-Over Districts" paper strongly implies that that polarization continues almost unabated. To recapitulate very briefly: In districts in which Latinos comprise less than 30 percent of the Democrats, they win only 2 percent of the contests. In districts in which they comprise more than 50 percent of the Democrats, they win 90 percent.

51. Third, in the 1996 and 1998 general elections, there were contests between Anglo and Latino candidates in three districts that overlap with MALDEF's proposed

senate district 27: Assembly districts 50 and 56, and congressional district 33. In those districts, in each case, according to ecological regression analyses carried out by Stanford Prof. Claudine Gay, Latino candidates received more than 90 percent of Latino votes. In both contests in the 56th Assembly district, Latino candidates got less than 50 percent of the Anglo vote. In the 50th Assembly district, they totaled 57 and 59 percent of the Anglo vote. In the 84 percent Latino congressional district 33, the Latino incumbent received about three-fourths of the tiny non-Latino vote.

52. Prof. Gay also analyzed votes for Propositions 187 (undocumented immigrants) in 1994, Proposition 209 (affirmative action) in 1996, and Proposition 227 (instruction in languages other than English) in 1998 for all of the Assembly, state senate, and congressional districts that overlapped with MALDEF's proposed senate district 27. Proposition 187 divided Latinos from non-Latinos quite neatly, with a district average of 24.4 percent of Latinos and 65.3 percent of non-Latinos endorsing the Proposition. The pattern of votes on Prop. 209 was more complicated because of the presence of large proportions of African-Americans, who generally opposed the proposition in three of the districts. Excluding those districts, Prof. Gay's estimate of Latino support for Prop. 209 was quite small, under 10 percent, while non-Latino support was substantial, over 50 percent. The estimates for Prop. 227 were similar to those for Prop. 187: 18.4 percent of Latinos and 56.6 percent of non-Latinos in an average district favored banning bilingual education.

53. Perhaps most significant, though unsurprising, were the results of Prof. Gay's analysis of the 1998 primary between Berman and Godinez in congressional district 26.

In that contest, Gay estimated that Rep. Berman received only 22.5 percent of the Latino vote, at the same time that he garnered 91.6 percent of non-Latino franchises. Such a striking pattern of racial polarization is unlikely to be altered dramatically by the statistical analysis of more detailed data.

/s/ J. Morgan Kousser
J. Morgan Kousser

## DECLARATION OF JUAN VARGAS

### Declaration of Assemblymember Juan Vargas

My name is Juan Vargas. I have personal knowledge of the facts as stated in this declaration. If called upon to testify as a witness in this matter, I could and would competently testify to the facts set forth herein.

1. I represent the 79th District in the California State Assembly, which includes the southern part of the City of San Diego, the City of National City and part of the City of Chula Vista. I am serving my first term after being elected in the November 2000 general election. Prior to the above-mentioned election, I served on the San Diego City Council, representing the eighth district, since February 1993.

2. I was asked by the Mexican American Legal Defense and Educational Fund (MALDEF) to provide this declaration of my personal knowledge relating to the 2001 legislative redistricting process.

3. As a member of the Assembly, I sit on a number of standing committees, including the Elections, Reapportionment and Constitutional Amendments Committee. Speaker Robert Hertzberg appointed me to the Redistricting Conference Committee on August 27, 2001. The Redistricting Conference Committee was created in an attempt to bring the two houses of the legislature to a consensus on the various proposals relating to the new district lines. There were six members of the Conference Committee: Speaker Hertzberg, Assemblymember Dave Cox, Senate President Pro Tempore John Burton, Senator Don Perata, Senator Jim Brulte and myself.

4. The Conference Committee never met publicly, never voted on any matter related to redistricting and never reached consensus on any of the various proposals. Due to my membership on this committee, I am familiar with the pre-2000 census district lines and the current district lines as passed by the legislature on September 13, 2001 as well as the other proposed amendments from various parties, which I will discuss in this declaration.

5. After being named to the Conference Committee, I was present in many meetings with consultants for the Assembly and Senate whose responsibility it was to draw the redistricting maps, including Michael Berman, Carl D'Agostino, Jim Wisley, Bill Cavala, and others.

6. On the Assembly Floor, I voted in favor of Senate Bill 802 (Committee), drafted by the Assembly consultants, which created the Assembly and Board of Equalization maps because, in my opinion, it followed the law and respected communities of interest.

7. On the Assembly Floor, I did not vote in favor of Assembly Bill 632 (Cedillo), drafted by the Senate consultants, which created the Senate and Congressional maps because, in my opinion, it intentionally divided Latino communities and disenfranchised voters in San Diego and the San Fernando Valley.

8. I objected then and object now to the newly-drawn Congressional seat held by Representative Bob Filner because the communities of Barrio Logan, Logan Heights, Golden Hill, Sherman Heights, Memorial, Grant Hill, Southcrest and Stockton, which are historically underserved and predominantly Latino, were in my opinion

purposely cut out of the district to reduce Latino percentages relative to population, voting age population and voter registration.

9. Each of these communities, except Barrio Logan, were situated in the Fiftieth Congressional District represented by Bob Filner during the 1990s. Each of these communities are also united with other south San Diego communities in the San Diego City Council's eighth district and the San Diego County Board's first district. Prior to the passage of these two redistricting bills, all of the above-mentioned communities except Barrio Logan were united with those same south San Diego communities in the state's 79th Assembly District and the 40th Senatorial District. All of these communities, including Barrio Logan, are united with those same south San Diego communities in the post-redistricting 79th Assembly District and the 40th Senatorial District.

10. The assembly consultants drew Senate and Congressional maps, but did not release them pursuant to an agreement between the leadership of the two houses, as communicated to me by Speaker Hertzberg, that the Assembly would draw Assembly districts, the Senate would draw Senate districts and the Senate consultants, who were also the Democratic Congressional Delegation consultants, would be allowed to submit Congressional districts for review and adoption.

11. As a member of the conference committee, I was present during a meeting where the Assembly consultants pleaded with the Senate consultants to release the Senate and Congressional maps (drawn by the Senate consultants). When the Senate consultants did not, the Assembly consultants threatened to release the Assembly-drawn

Senate and Congressional maps publicly. That Assembly-produced Congressional map contained a San Diego district with over 42% Latino registration. That district contained south San Diego County, Imperial County and the communities of Barrio Logan, Logan Heights, Golden Hill, Sherman Heights, Memorial, Grant Hill, Southcrest and Stockton. That same Assembly-drawn Congressional map maintained the Latino registration, voting age population and population in the former 26th Congressional District at its previous levels. That map was never released by the Assembly because the Senate ultimately released their maps.

12. Before the redistricting bills passed, there were numerous meetings conducted between September 4, 2001 and September 13, 2001 between members of the conference committee and the above-mentioned consultants in order to reach an agreement on the district lines.

13. During one of those meetings in which Carl D'Agostino was also present, Michael Berman said to me, "I will not draw Filner's district with over 40% Latino reg. or over 50% Latino V.A.P."

14. Michael Berman also said to me, "I cannot put too many Hispanics in that district, or you will beat Bob, you know that."

15. Michael Berman also said to me, "I have a fiduciary responsibility to Filner to draw a district where he won't lose to you or a Hispanic in the primary. Filner won't survive a primary to a Hispanic if I put him in Imperial County. I won't do that to him. I'd have to give him his money back. And he hasn't been a problem."

16. Michael Berman also said to me, "we have to divide Hispanics, Filner won't survive otherwise. And you just want to see him die a slow death."

17. Michael Berman told me that every Democratic member of Congress was supposed to pay him $20,000 for him to draw the member a seat. Michael Berman told me that members that paid their dues would be taken care of and the ones that didn't, like Xavier Becerra, whom he named specifically, might not like their districts.

18. Michael Berman made some of the above comments more than once. It was a theme he kept referring to. To the best of my knowledge, Michael Berman referred to reducing Latino percentages so that Filner wouldn't lose to me or any Latino in the primary at least five or six times. In fact, Michael Berman never mentioned communities of interest, or any other similar consideration. He was solely concerned about ethnicity. He made these representations in front of me privately; in front of me and Carl D'Agostino; in front of me, Jim Wisley and Bill Cavala; and in front of me and Speaker Robert Hertzberg and many other people involved with the Conference Committee.

19. As a result of Michael Berman's demands that Filner's district have less than 40% Latino registration and less than 50% Latino voting age population, a few days before the redistricting maps passed, Speaker Hertzberg requested that Jim Wisley, Bill Cavala and I return to room 4206 in the Capitol annex to try to draw a district that wouldn't go over those numbers, yet still respected communities of interest. Jim Wisley, Bill Cavala and I produced a San Diego congressional district with 40.00% Latino registration and a 51.94% Latino voting age

population. I understood from Wisley and Cavala that they were not able to meet Michael Berman's demands with respect to Latino voting age population without dividing communities of interest. The district contained south San Diego County, Imperial County and the communities of Barrio Logan, Logan Heights, Golden Hill, Sherman Heights, Memorial, Grant Hill, Southcrest and Stockton. That map was later posted on the assembly web site and available to the public as a "Proposed Amendment." I have attached it as Exhibit A.

20. Despite the reduction of Latino percentages, Michael Berman rejected it the next day stating that, "Filner would not accept it. He can't win the primary. I'd have to give him his $20,000 back. I wouldn't be able to keep that money."

21. Again, Michael Berman demanded that the "Latino reg. must be below 40% and that Latino V.A.P. must be below 50%."

22. Neither house of the legislature voted on the Assembly proposed amendment nor any of the Assembly-drawn Congressional maps, which specifically did not reduce Latino registration, voting age population or population in the former 50th (current 51st) or the former 26th (current 28th) Congressional Districts.

23. Bill Cavala and Jim Wisley told the Speaker and myself in a meeting at the redistricting office off of the Garden Highway that they were particularly troubled by the Senate-drawn Congressional maps with regard to the former 50th (current 51st) or the former 26th (current 28th) Congressional Districts because of Voting Rights Act problems. Because of the potential legal problems with the Senate-drawn Congressional map, the Speaker told me,

and I agreed, that we would make the Assembly-drawn Assembly maps and the Senate-drawn Senate and Congressional maps separate pieces of legislation so that the legal problems related to the Senate-drawn Congressional maps would not affect the Assembly maps.

24. After rejecting the Assembly proposed amendment, Michael Berman came up with yet another version of the Congressional district in south San Diego and the Senate amended their state map to include this district. The Senate voted for it and passed it over to the Assembly. It reduced the Latino registration to 39.84% and Latino voting age population to 48.99%. It accomplished that by cutting out the communities of Barrio Logan, Logan Heights, Golden Hill, Sherman Heights, Memorial, Grant Hill, Southcrest and Stockton. This map passed in the Assembly without my support.

25. At this point, I am unclear about whether the attorney-client privilege attaches to me, individually, or the Assembly, as a whole. There are some conversations that I have chosen not to reveal until this issue is resolved for me, particularly some statements that I specifically recall were made in the presence of our legal counsel.

I declare under penalty of perjury, that the foregoing is true to the best of my knowledge. Executed on October 10, 2001 in San Diego, California.

/s/ Juan Vargas
Juan Vargas

## DECLARATION OF ANTONIO GONZALEZ

I, Antonio Gonzalez, declare as follows:

1. I have personal knowledge of the following facts. If called as a witness, I could and would testify competently to those facts.

2. I am the President of the William C. Velasquez Institute (WCVI), a national non-profit research and political organization located in San Antonio, Texas and Los Angeles, California. I am also the President of the Southwest Voter Registration Education Project (SVREP). I have been President of both organizations since 1994. We organize dozens of voter registration drives throughout the United States each year. WCVI is also part of a coalition with MALDEF that submitted redistricting proposals to the legislature. These plans included Assembly, Senate, and Congressional maps. In preparation of our plans, we organized an intensive redistricting outreach campaign throughout California.

3. On the morning of September 6, 2001, I had a telephone conversation with Congressman Howard Berman where we discussed the initial redistricting plans that had been released by the legislature. Congressman Berman told me that he felt they were good plans that improved the Latino situation on all levels. I told him that the plans diluted and fractured the Latino vote in San Fernando, San Diego, and Southeast Los Angeles.

4. Later that afternoon, I convened a conference call in which the following people identified themselves: Congressmen Howard Berman, his brother and congressional redistricting consultant Michael Berman, Senator Don Perata, Sandi Polka from Speaker John Burton's office,

Amadis Velez from MALDEF, Denise Hulett from MALDEF, Vibiana Andrade from MALDEF, Arturo Rodriguez of the United Farm Workers, and Zachary Gonzalez from WCVI. During that meeting we discussed the San Fernando Valley congressional seat, the Southeast Los Angeles Senate seat, and the San Diego Congressional seat. Michael Berman stated that he had an obligation to the democratic delegation in terms of making sure that he could get the plan passed.

5. Later that evening I participated in a teleconference where the following people identified themselves at Senator Don Perata's office: Amadis Velez and Steven Ochoa from MALDEF, Michael Berman, Sandi Polka, Carl D'Agostino, and Rosalinda Guillen. Denise Hulett was present by phone. At some point during our conversation Don Perata entered the room but did not participate in the meeting.

6. During the course of the discussion, Michael Berman stated that the Latino community in Congressional District 26 voted in "ethno-centric" patterns, voting based on "surname," implying the need to protect Howard Berman from that type of voting challenge. He referred to the 1998 primary election where Godinez challenged Berman. He said, "The 1998 voters were drawn to surname. It was an ethno-centric vote, not a polarized vote."

7. Michael Berman stated "we don't want Howard working on district maintenance at home when he could be frying better fish in DC." He emphasized that much of the legislation sponsored by Howard Berman is beneficial to the Latino community. Michael Berman said that he would not put any more Latinos in Congressman Brad Sherman's

district than was originally proposed, because Howard would "not do that to Brad."

8. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

9. Executed in Los Angeles, California on October 11, 2001.

/s/ Antonio Gonzalez
Antonio Gonzalez

JOINT HEARING

ASSEMBLY ELECTIONS, REAPPORTIONMENT AND CONSTITUTIONAL AMENDMENTS COMMITTEE

AND

SENATE ELECTIONS AND REAPPORTIONMENT COMMITTEE

TRANSCRIPT OF

PUBLIC HEARING ON REDISTRICTING

PUBLIC COMMENT ON PROPOSED REDISTRICTING PLANS

SEPTEMBER 4, 2001

HEARING AT THE STATE CAPITOL

WITH INTERACTIVE TESTIMONY FROM

SAN FRANCISCO, SAN JOSE, MONTEREY AND FRESNO

REPORTED BY: VALERIE L. NUNEMACHER, CSR 10783

WENDY E. ARLEN, CSR 4355

[128] CHAIRPERSON LONGVILLE: Thank you very much for the time to be here today again, and Senator Perata.

SENATOR PERATA: Yes, I wanted to refer back to the previous speakers, no offense on anybody, but I was in my office and stuck and I would just like to read this statement, brief statement into the record.

As chairman of the Senate Elections and Reapportionment Committee I know that the Senate and Congressional plans are a major breakthrough in opportunities for

increased Latino representation in California. Without question these redistricting plans are undoubtedly a major step forward. In the Senate we currently have seven Latinos in the Senate, and as a result of this plan, two and perhaps three more are almost sure additions.

The 16th Senate District currently 60.5 percent Latino was raised to 63.2 percent Latino. The 40th Senate District presently 43.1 percent Latino raises to 60.3 percent, a 17.2 percent increase. Beyond the obvious, the new 18th District is now 46.2 percent Latino. These are major gains.

Also, in the long term there are even more opportunities for Latinos. The 27th Senate District has a percent increase of 13, from 31.8 to 45.1 under the proposal, the 34th Senate District has increased from 58 and a half up to 58 and a half from 54.9.

Most importantly none of these gains are at the expense of the two African American Senate seats. In congress we have a new Latino Congressional District in Los Angeles County and all the six incumbents are strengthened which is a considerable point.

Also there are long-term opportunities in the 20th District in the Central Valley which remains at approximately 65 percent Latino and the 18th Central Valley District which has increased to 41.6 percent from 36.4 percent.

As Rosalinda said in my absence, in terms of the San Fernando Valley to waste Latino voting strength on Howard Berman, a person whose natural inclination and considerable challenge and demonstrated record over the last two decades will be used to support regardless of

ethnic composition of the district, is contrary to the interest of the community. Howard Berman has historically proven to be an ardent supporter of Latino issues and most importantly this has been a function of personal interest and care rather than need. I will admit that Howard Berman is a longtime friend of mine whose 30-year record of strong support for Latino and farm worker interest time and again has been demonstrated, and in fact is one of the reasons that he and I became friends over 30 years ago.

As a result we have maximized long-term opportunities for additional representation and stronger support by moving some of the Latino population to an adjacent district which under our proposal is approximately 51 percent Latino versus 19.8 percent in the old district to encourage Congressman Sherman, the incumbent, to take leadership on issues of concern to the Latino community as Howard Berman has done for the past 30 years.

Of course, if Mr. Sherman decides to leave, the opportunities are palatable. These plans maximize Latino voting strength, increase representation and best reflect the interest of Latinos in California according to the work in all of the things we've listened to for the last seven months.

Opposition to these proposals in our judgment would be contrary to Latino interests. We want to just once again stipulate to the fact that what we have done here is to balance the broad interest of the diversity of California. I think we've done so in a way that is both responsible but reflective of the major changes that have occurred and will

continue to occur in the population of this state and I thank you.

CHAIRPERSON LONGVILLE: Thank you very much,

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 02-577

In The
# Supreme Court of the United States

MARIA CANO, ET AL.,

*Appellants,*

v.

GRAY DAVIS, ET AL.,

*Appellees.*

**On Appeal From The United States District Court For The Central District Of California**

## APPELLEE HERB J. WESSON'S MOTION TO DISMISS OR AFFIRM AND JOINDER

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## MOTION TO DISMISS OR AFFIRM AND JOINDER

Appellee-Defendant Herb Wesson, Jr., in his official capacity as the Speaker of the California State Assembly, respectfully requests that the Court dismiss this appeal for want of a substantial federal question or, in the alternative, affirm the three-judge district court per curiam opinion granting in full defendants' motions for summary judgment. This motion is brought pursuant to Supreme Court Rule 18.6.

This case involves an appeal from a three-judge district court in which appellants challenged California's 2001 congressional and state Senate redistricting plans. The district court unanimously concluded that the "legislature permissibly exercised its broad discretion to draw district lines, and that, in doing so, it violated neither the Voting Rights Act nor the Constitution." J.S. App. 2. Appellee Wesson believes the district court opinion was correct and therefore this appeal should be dismissed or, in the alternative, the opinion should be affirmed.

Appellee Wesson will defer to the arguments presented by, and therefore joins in, the motion to affirm or dismiss that the Senate appellees will be filing with the Court.

Respectfully submitted,

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November 27, 2002

No. 02-577

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MARIA CANO, *et al.*,

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v.

GRAY DAVIS, *et al.*,

*Appellees.*

**On Appeal from the United States District Court for the Central District of California**

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## QUESTIONS PRESENTED

Where undisputed facts demonstrate that a challenged electoral district affords Latino voters an equal opportunity to participate in the political process and elect candidates of their choice, is a federal court nonetheless precluded from granting summary judgment against Section 2 and Equal Protection claims in which plaintiffs allege that the State intended to lessen Latino voting strength in the district that affords equal electoral opportunity?

Where the undisputed facts demonstrate that district lines adhere to traditional districting criteria, are multi-racial in character, and send no message either that they are based on race or that elected officials should disregard constituents of any race, is a district court nonetheless precluded from granting summary judgment to a State against claims that the districts violate the doctrine established by *Shaw v. Reno*, 509 U.S. 630 (1993), because they intentionally exclude some Latino voters?

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## STATEMENT OF THE CASE

In a detailed and well-reasoned opinion, the District Court granted summary judgment upholding California's 2001 redistricting statute ("AB 632") against novel constitutional and Voting Rights Act challenges. These challenges were brought by Appellants, certain Latino voters and Latino civil rights organizations, who sought to require the State to maximize the number of districts in which Latinos would constitute at least 40% of the Democratic primary electorate.

AB 632 was passed with the overwhelming support of the State's substantial Latino Caucus. Uncontroverted facts demonstrated that in the particular districts that are the subject of this appeal, Congressional Districts 28 and 51 ("CD 28" and "CD 51"), Latino voters have at least an equal opportunity to participate in the political process and to elect candidates of their choice. Appellants themselves admitted as much with respect to CD 51. In the case of CD 28, undisputed evidence demonstrated that in the area comprising the district, Latino candidates routinely win elections against non-Latino candidates. Appellants produced no evidence that the Legislature subordinated traditional redistricting criteria to race in drawing the lines for either district or that either district is unexplainable on grounds other than race. As a result, the District Court concluded "that the legislature permissibly exercised its broad discretion to draw district lines, and that, in doing so, it violated neither the Voting Rights Act nor the Constitution." J.S. App. 2.[1]

Appellants' arguments for reversal are based on a misreading of the District Court's opinion and on legal principles foreign to this Court's jurisprudence. The decision below constitutes a routine application of settled legal principles and no more warrants plenary consideration by this Court than it

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[1] Citations to "J.S. App." are to the Appendix to Appellants' Jurisdictional Statement.

did the burden and expense of a trial below. No substantial federal question is presented, and there is no split in authority among the circuits or among three-judge district courts on any question that Appellants ask the Court to address.

Summary disposition by this Court will affirm that summary adjudication of insubstantial redistricting cases is appropriate and indeed necessary to avoid improperly burdening states that do not accede to demands that they redistrict pursuant to rigid racial "maximization" criteria. The judgment below should be affirmed or the appeal dismissed for want of a substantial federal question.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Latino Political Success In California Prior To AB 632

California's Latino candidates enjoyed remarkable success during the 1990s. At the time the Legislature enacted AB 632, Latino representatives comprised 22% of the California Legislature, including seven of the State's forty Senators (17.5%), and nineteen of the State's eighty Assembly Members (23.75%). J.S. App. 4, 57. As the District Court noted, "both the Assembly and Senate redistricting committees included Latino members," and "[a]t the time the redistricting bill was enacted," Latinos held several key "leadership positions" in the California Legislature including Senate Majority Leader, Senate Majority Whip, Senate Judiciary Committee Chair, Assembly Floor Leader, and Assembly Budget Committee Chair. *Id.* at 73.

Twice during the 1990s, Latinos were elected Speaker of the California Assembly.[2] Cruz Bustamante was elected Speaker in 1996, and later went on to become California's

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[2] District Court ("D. Ct.") Docket No. 185 (Declaration of Keith E. Weaver In Support Of Senate Defendants' Motion For Summary Judgment Re: San Fernando Valley Congressional Districts), at ¶¶ 5, 7.

Lieutenant Governor, a position to which he was re-elected in 2002.[3] In 1998, Antonio Villaraigosa was elected Speaker by Assembly Democrats, while Assembly Republicans elected Assemblymember Rod Pacheco as their leader. *See supra* note 2, at ¶¶ 5, 7.

Latinos are also prominent in the "internal hierarchy of the majority political party in California." J.S. App. 73. The California Democratic Party leadership includes three Latinos, all of whom are elected by Party representatives, including "long-time California Democratic Party Chairman Art Torres." *Id.* at 73-74.

At the time AB 632 was enacted, six of California's then fifty-two congressional districts were represented by Latinos. *See supra* note 2, at ¶¶ 18-20. Of the fifteen congressional districts in Los Angeles County, four were served by Latino representatives. *Id.* at ¶ 14; *Wilson v. Eu*, 823 P.2d 545, 594-95 (Cal. 1992).

## B. The 2001 Redistricting Process And AB 632

### 1. *AB 632 Provides Equal Opportunity To Latino Voters*

California gained an additional congressional seat in the 2001 reapportionment, increasing the delegation to fifty-three members. J.S. App. 2. Appellants admit that AB 632 includes nine congressional districts that provide Latino voters with a fair opportunity to elect candidates of their choice. M.A. App. 13a (¶54).[4] Included among Appellants' nine "fair" districts is CD 51, one of the districts that Appellants nonetheless challenged below and continue to challenge

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[3] The 2002 California Lieutenant Governor Election Results are available at http://vote2002.ss.ca.gov/Returns/ltg/oo.htm (last modified Nov. 21, 2002). *See also supra* note 2, at ¶¶ 5, 7.

[4] Citations to "M.A. App." refer to the Appendix attached to this Motion to Affirm or Dismiss.

in this appeal. J.S. App. 81. These nine districts—even were they the only districts that Latino voters are likely to dominate—make up 17% of the congressional districts in California. By comparison, only 16% of California's registered voters and 17.5% of California's citizen voting-age population are Latino.[5] *Supra* note 2, at ¶¶ 3-4.

AB 632 also reflected growing Latino voting strength in ethnically diverse Los Angeles County. CD 39 is "a majority-Latino district located in the southeastern portion of Los Angeles County." J.S. App. 72. The evidence before the District Court demonstrated that CD 39 had no incumbent and that this "new" district was likely to elect an additional Latino representative in November 2002.[6] As the District

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[5] In addition to the nine districts that Appellants embrace—Congressional Districts 20, 31, 32, 34, 38, 39, 43, 47 and 51—there are four additional districts in which Latinos have significant voting strength. *See supra* note 2, at ¶ 20. One such district is CD 28, which is 56% Latino in population and 27% Latino in registration. *Id.* at ¶ 23; J.S. App. 37. Similarly, CD 18 is 42% Latino in population, and the Latino registration is 26%. *Supra* note 2, at ¶ 16. With Latinos comprising over a quarter of the registered voters in both districts, representatives of these districts will clearly need to be responsive to the Latino community. *Cf. Rural W. Tenn. African Am. Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1105 (W.D. Tenn.) (three-judge court) ("A serious candidate for office cannot ignore 25% of the population that tends to vote as a bloc."), *summarily aff'd*, 516 U.S. 801 (1995). In two other congressional districts, CDs 16 and 21, Latinos comprise over 22% of the registered voters. *Supra* note 2, at ¶ 16. These four districts are, at a minimum, Latino "influence" districts. In the 2002 elections, CD 21 elected Republican Devin Nunes and CD 18 elected Democrat Dennis A. Cardoza. *See generally* http://vote2002.ss.ca.gov/Returns/usrep.htm (last modified Nov. 21, 2002). Adding the nine districts identified by Appellants to the four influence districts, there are at least thirteen congressional districts out of fifty-three (24.5%) in which Latino voters have a powerful electoral voice.

[6] The district ultimately elected Representative Linda Sanchez. *See* http://vote2002.ss.ca.gov/Returns/usrep/3900.htm (last modified Nov. 21, 2002).

Court summarized: "As a result of redistricting, 5 of 15 (33 1/3%) congressional seats with some territory in Los Angeles County will almost certainly be held by Latinos, although Latinos constitute only 24% of the county's registered voters." *Id.*

### 2. *AB 632 Adheres To Traditional Districting Criteria*

In drawing California's congressional districts, the Legislature was guided by various statutory and constitutional criteria. For example, both the State and Federal Constitutions require that the population of all California congressional districts be nearly equal. *See* Cal. Const. Art. XXI, § 1; *Karcher v. Daggett*, 462 U.S. 725, 730 (1983). California also requires that districts be contiguous and respect political boundaries such as city limits. *See* Cal. Const. Art. XXI, § 1.

AB 632 adheres to these traditional districting criteria. It achieves exact population equality and carefully preserves the integrity of city boundaries. J.S. App. 21 n.14, 23, 31. The District Court also found that both CDs 51 and 28 are compact and contiguous. *Id.* at 31.

### 3. *The Process By Which AB 632 Was Adopted Was Open And Inclusive*

Following the release of 2000 census figures, the California Legislature held a series of hearings at which community members testified regarding potential changes to district boundaries. *Id.* at 2-3. Latino advocacy groups including Appellants' counsel, the Mexican American Legal Defense and Educational Fund ("MALDEF"),[7] testified extensively at these hearings. *Id.* at 3.

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[7] Regarding MALDEF's role in the redistricting process, the District Court stated: "MALDEF was a leading participant in the redistricting period . . . and [Plaintiffs' expert] Dr. Kousser worked with it, applying

The Legislature subsequently released proposed district lines and "heard public comment on the draft plan." *Id.* at 4. Advocacy groups, including MALDEF, again commented on the proposed districts, and the initial plans for CDs 28 and 51 were significantly revised. *Id.* at 73. These changes were included in a second districting plan, which was introduced in the Legislature as AB 632. *Id.* at 4.

MALDEF and another group, the William C. Velasquez Institute ("WCVI"), drafted their own districting plan, which they submitted to the Legislature along with an article by Professor J. Morgan Kousser, Appellants' expert in this case. J.S. App. 168. Dr. Kousser's article, entitled "The Role of Cross-Over Districts in a Fair Redistricting: Lessons from the 1990s" ("Cross-Over Voting"), proposes a novel redistricting requirement that is explicitly grounded on race and presumed identification between race and political party. According to Dr. Kousser, in order to maximize the number of Latinos elected to public office, the Legislature should create districts in which Latinos constitute at least 40% of the district's Democratic registration.[8] Dr. Kousser's 40% rule forms the basis for Appellants' argument that AB 632 improperly dilutes Latino voting strength.[9]

AB 632 was enacted by the most diverse Legislature in California's history, and received overwhelming bipartisan support, including the unanimous support of the minority

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the theories he now offers as an expert witness in this case. Accordingly, some of MALDEF's submissions to the legislature may be relevant evidence, not because they constitute plaintiffs' position in this litigation, but because they reflect the opinion of MALDEF's expert on the issues presented by this case." J.S. App. 59 n.36.

[8] *See, e.g.*, D. Ct. Docket No. 207 (Appellants' Opposition To Senate Defendants' Motion For Partial Summary Judgment Re: San Fernando Valley Congressional Districts), at 19-20.

[9] Dr. Kousser's article is attached to D. Ct. Docket No. 7 (Declaration Of Expert Witness J. Morgan Kousser), at Exhibit C.

Republican Party. It passed by a thirty-eight to two margin in the Senate and by a seventy to ten margin in the Assembly. J.S. App. 4. Although alleged by Appellants to constitute an intentional and invidious discrimination against Latinos, the bill won the support of twenty-three out of twenty-six Latino members of the Legislature, including every Latino State Senator in California. *Id.*

### C. The Challenged Districts

On appeal, Appellants challenge only two of California's fifty-three congressional districts: CD 28, which is located in Los Angeles County's San Fernando Valley, and CD 51, which extends along the United States-Mexico border, and includes portions of San Diego and all of Imperial County, which lies to the east of San Diego County.[10]

Both CDs 28 and 51 are majority-minority districts. The population of CD 28 is approximately 55.7% Latino, 6.8% Asian-American, and 5% African-American. *See supra* note 2, at ¶ 23; J.S. App. 37. CD 51 is even more diverse. Its population is approximately 53.3% Latino, 14.5% Asian-American, and 10.8% African-American .[11]

Representative Howard Berman resides in CD 28, and Representative Bob Filner resides in CD 51. Both districts differ from the districts previously represented by these incumbents, Districts 26 and 50, respectively. The 1991 redistricting plan was crafted by a team of Special Masters, appointed by the California Supreme Court following a

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[10] Appellants unsuccessfully alleged that the district lines of a single State Senate district, Senate District 27 ("SD 27"), diluted Latino voting strength in violation of Section 2 of the Voting Rights Act, J.S. App. 49-63, but Appellants do not appeal from that part of the District Court's ruling, J.S. 5 n.3.

[11] D. Ct. Docket No. 180 (Declaration of Keith E. Weaver In Support Of Senate Defendants' Motion For Partial Summary Judgment Re: San Diego Congressional Districts), at ¶ 3.

legislative stalemate.[12] *Wilson*, 823 P.2d at 548; *see also* J.S. App. 12 n.7. In drawing CD 26, the Masters "abandoned the historical district configurations in the Valley, and substantially altered the district that Rep. Berman had long represented." J.S. App. 35. In doing so, the Masters removed Congressman Berman from many southern areas of the San Fernando Valley that he had represented "for decades as a member of the California Assembly and in Congress." *Id.*

AB 632 restored much of the territory previously represented by Congressman Berman. *Id.* Indeed, over 98% of the population added to CD 28 resides in areas that he previously represented either in Congress or in the Assembly or both. M.A. App. 33a (map). The Latino "core" in the Valley, and the core of Congressman Berman's district from the 1990's, remained intact. J.S. App. 18, 35; *see also* M.A. App. 31a-32a (maps).

With respect to CD 51, the most significant change was the inclusion in the district of Imperial County. Although the Legislature's initial proposal placed Imperial County in neighboring Congressional District 53 ("CD 53"), the proposal was modified after MALDEF argued that voters in Imperial County share a community of interests with voters in San Diego due to their mutual proximity to the Mexican border. J.S. App. 23. MALDEF and WCVI later sent a letter

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[12] Dr. Kousser has written disapprovingly of the Masters and the plan they created. According to Dr. Kousser, all three Masters were "Anglo" because a Spanish-surnamed Master, Rafael Galceran, "was completely unknown to the Latino legal community in Los Angeles . . . ." J. Morgan Kousser, Colorblind Injustice, 171 n.102 (The University of North Carolina Press 1999). When the then leader of MALDEF's reapportionment efforts testified before the Masters, he observed: "All I remember is looking up at three old white men." *Id.*

to the Legislature endorsing the inclusion of Imperial County in what became the final district lines for CD 51.[13]

**D. Procedural Background**

Appellants' First Amended Complaint alleged that CD 28 and CD 51 violate both Section 2 of the Voting Rights Act ("Section 2"), 42 U.S.C. § 1973, and the Fourteenth Amendment to the United States Constitution. M.A. App. 1a-19a. Appellants advanced three distinct legal theories: (1) that CD 28 violates Section 2 because it has a discriminatory effect on the ability of Latino voters to participate equally in the political process and elect candidates of choice;[14] (2) that CD 28 and CD 51 were drawn with the intent to dilute Latino voting strength in violation of both Section 2 and the Fourteenth Amendment; and (3) that CD 28 and CD 51 allegedly constitute an unconstitutional racial gerrymander in violation of *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), and its progeny. M.A. App. 1a-19a; *see also* J.S. App. 5-6. In sum, Appellants alleged that nine of California's fifty-three congressional districts (17%) do provide Latino voters a fair opportunity to elect candidates of their choice, but that one

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[13] D. Ct. Docket No. 147 (Declaration Of Bruce A. Wessel In Support Of Senate Defendants' Motion For Protective Order), at Exhibit D. Appellants concede that CD 51 provides Latino voters with an equal opportunity to elect candidates of choice, J.S. App. 81, and Appellants' expert, Dr. Kousser, concluded that "there was no discriminatory effect in the drawing of congressional district 51. . . .," *id.* at 135.

[14] The District Court granted summary judgment to Defendants on this claim as well, and Appellants have waived any challenge to that part of the District Court's ruling by failing to address this aspect of the ruling in either their Questions Presented or their Jurisdictional Statement. *See* Supreme Court Rule 14.1(a) ("Only questions set out in the petition, or fairly included therein, will be considered by the Court."); *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997) (citing Supreme Court Rule 14.1(a)); *see also* Supreme Court Rule 18.3 (stating that appellant filing jurisdictional statement should "follow, in so far as applicable, the form for a petition for a writ of certiorari").

more such congressional district "could have been drawn." M. A. App. 13a (¶ 54). As the District Court explained, Appellants' proposed remedy for both their dilution claims and their *Shaw* claims is a plan "that contains the maximum number of majority-Latino districts possible." J.S. App. 20.

On October 15, 2001, Appellants unsuccessfully moved for a temporary restraining order ("TRO") to postpone primary elections in the challenged districts. *See Cano v. Davis*, 191 F. Supp. 2d 1135 (C.D. Cal. 2001). Later, several minority groups, including "Los Angeles-area Latino community organizations," applied to intervene on the side of Defendants. J.S. App. 4 n.4. Their applications were denied, although they were permitted to participate as *amici curiae*. *Id.*

Defendant Senator John Burton, in his official capacity as President Pro Tempore of the California State Senate, and Intervenor-Defendant California State Senate (collectively, the "Senate") thereafter moved for summary judgment on all claims, and the other Defendants joined in the motions. J.S. App. 7. The Senate argued that the undisputed facts demonstrate that the challenged districts are fair and that the *Shaw* doctrine is not implicated by either CD 28 or CD 51. The Senate submitted extensive and uncontradicted evidence of election results that demonstrated the electoral success of Latino-preferred candidates. *See, e.g.*, M.A. App. 20a-30a (Declaration of Professor Allan J. Lichtman).[15] The Senate also submitted uncontroverted evidence demonstrating that the challenged districts adhere to traditional districting criteria and are readily explainable on grounds other than race.

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[15] Professor Lichtman is, as Appellants have acknowledged, "a widely-recognized expert on bloc voting and quantitative analysis." *Supra* note 8, at 23. Professor Lichtman has published numerous scholarly works on voting rights. *See, e.g.*, Allan J. Lichtman & J. Gerald Herbert, "A General Theory Of Vote Dilution," 6 La Raza L.J. 1 (1993).

Appellants failed to submit any evidence that Latino-preferred candidates are regularly defeated in any of the challenged districts. Instead, Appellants relied primarily on the same evidence that they relied on at the TRO phase, including Dr. Kousser's Cross-Over Voting article and its novel racial and partisan redistricting criterion. As explained above, that article argued that the Legislature, in order to maximize the number of Latinos elected to office, should create districts in which Latinos comprise at least 40% of the registered Democratic voters. This theory, advanced by Appellants below as the appropriate legal standard for courts to adopt in enforcing the Voting Rights Act and the Constitution, is unprecedented in at least two ways. First, although Section 2 safeguards the ability of protected classes of voters to "participate in the political process and elect *representatives of their choice*," 42 U.S.C. § 1973(b) (2002) (emphasis added), Dr. Kousser's theory is aimed explicitly at maximizing the election of candidates who are themselves Latino as opposed to candidates favored by Latinos. Second, by focusing only on the Latino percentage of Democratic registration, Dr. Kousser's theory ignores the growing number of Latino voters who are registered with the Republican Party or other political parties. J.S. App. 48 n. 28.[16]

Appellants' largely ignored the Senate's "effects" evidence, relying instead on "intent" allegations. The Senate

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[16] As the *Sacramento Bee* reported, "Kousser's study, strangely, ignored the success of the four Hispanic Republicans who were elected in districts that were not 'Hispanic' by any stretch of the imagination." Daniel Weintraub, *Time To Look Beyond Ethnicity In District Lines*, Sacramento Bee, Sept. 9, 2001. "I don't know why Latino Republicans win in those areas," Dr. Kousser told the *Bee*. "It's a huge puzzle." *Id.* But as the District Court observed, voting in California does not follow the pattern of "rigid racial bloc voting on all sides" that Judge Posner found in 1998 Chicago. *See Barnett v. City of Chicago*, 141 F.3d 699, 703 (7th Cir. 1998).

filed over twenty pages of objections to this evidence, including objections to sworn statements by Appellants' fact witnesses, as well as portions of the declarations and report submitted by Dr. Kousser. The District Court found it unnecessary to rule on these objections because Appellants' evidence was, in any event, inadequate to warrant a trial. *Id.* at 3 n.2.[17]

The Senate's reply highlighted Appellants' failure to demonstrate that candidates favored by Latinos are routinely defeated by non-Latino bloc voting in the territories that comprise CDs 28 and 51, or to provide evidence necessary to support their *Shaw* claims. With respect to CD 51, Appellants *admitted* that Latinos have a fair opportunity to elect a candidate of their choice. With respect to CD 28,

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[17] The intent evidence included a declaration by Assemblymember Juan Vargas, who unsuccessfully challenged Representative Filner for Congress in 1992 and 1996. In deposition, Mr. Vargas noted that he "hate[s]" Representative Filner, but testified that the Legislature did *not* enact AB 632 with the intent of discriminating against Latinos. M.A. App. 42a-45a (deposition excerpts). Appellants first submitted a declaration by Mr. Vargas in connection with their application for a TRO. J.S. 10 n.6; J.S. App. 161-67. The declaration allegedly reports statements of other members of the Legislature or their staff in violation of established legislative privilege precedents. In ruling on privilege issues, the District Court expressly held that Mr. Vargas did not have the right to waive the legislative privilege held by other Legislators. J.S. App. 94. (Morrow and Snyder, D.J.J., Reinhardt, C.J., dissenting). Mr. Vargas submitted a narrower declaration in opposition to the Senate's summary judgment motions. *Id.* at 121-25. The TRO declaration was not submitted to the District Court in connection with the summary judgment motions that are the subject of this appeal, see Summary Judgment Oral Argument Transcript (May 13, 2002) at 163-64 (acknowledgement of Appellants' counsel), and Appellants do not appeal the District Court's privilege ruling. Accordingly, this Court should decline to consider Mr. Vargas's TRO declaration, which Appellants have nonetheless included in the Appendix to their Jurisdictional Statement. *See, e.g.*, J.S. 10 n.6; J.S. App. 161-67.

Professor Allan J. Lichtman concluded that "in most elections, Hispanic candidates of choice would have been elected within the precincts [that comprise] CD 28." M.A. App. 21a.

The District Court heard oral argument on the motions on May 13, 2002, and on June 24, 2002 granted summary judgment in favor of Defendants on all claims. This appeal followed.

## THE RULING OF THE DISTRICT COURT

### A. The District Court Held That The State Was Entitled To Summary Judgment On Appellants' Vote Dilution Claims Because The Undisputed Evidence Demonstrated That Latino Voters Have An Equal Opportunity To Participate In The Political Process And To Elect Candidates Of Their Choice In The Challenged Districts.

The District Court rejected all of Appellants' vote dilution theories. The District Court first addressed what it termed "the traditional statutory vote dilution" claim under Section 2 (the "effect" claim), and then addressed Appellants' "intentional vote dilution claims" under both Section 2 and the Constitution (the "intent" claims).

#### 1. *The Effect Claim*

Because CD 51 was conceded to provide Latino voters an equal opportunity to elect candidates of their choice, the only congressional district challenged under the Section 2 "effect" standard was CD 28. In addressing this claim, the District Court explained the three pre-conditions set forth by this Court in *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986), J.S. App. 41-42, and this Court's observations in *Johnson v. De Grandy*, 512 U.S. 997 (1994), "that vote dilution under § 2 is not automatically established even if all three *Gingles* pre-conditions are established," J.S. App. 43. If the *Gingles*

pre-conditions are satisfied, "a court . . . must then assess the totality of the circumstances to determine if . . . minority voters' political power is truly diluted." J.S. App. 43. The District Court concluded that because of the absence of *Gingles*' "pre-condition three" there was no need to "reach the totality of the circumstances test." *Id.* at 44. The District Court explained that, under the third *Gingles* pre-condition, the plaintiff "must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Id.* at 42. The obvious corollary is that "if minority-preferred candidates actually win elections, then the minority is able to elect representatives of its choice" and there is no need for federal court intervention. *Id.*

The undisputed factual record before the District Court showed that Latino-preferred candidates regularly win elections "in the territory that constitutes CD 28." *Id.* at 64. "[A] substantial number of white voters in the San Fernando Valley [in which CD 28 is located] are willing to support Latino and Latino-preferred candidates and . . . white-bloc voting does not result in the regular defeat of Latino or Latino-preferred candidates." *Id.* at 66. The District Court cited uncontroverted election results from the 2001 City of Los Angeles mayoral and city attorney elections in which both the Latino mayoral candidate and the Latino city attorney candidate won the precincts comprising CD 28.[18]

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[18] Antonio Villaraigosa, a Latino running for mayor, "handily defeated" a white opponent "in the precincts that now constitute CD 28" by a margin of "54.7% to 45.3%." J.S. App. 67. With "the assistance of white cross-over votes, city attorney candidate [Rocky] Delgadillo won the precise area that now comprises CD 28" by a margin of "52% to 48%." *Id.* In a City Council election that "pitted a white candidate, Wendy Greuel, against a Latino, Tony Cardenas, . . . Cardenas won the precincts that are within CD 28 in both the primary and the general elections." *Id.* All three candidates were the overwhelming choice of Latino voters.

The District Court concluded that: "CD28 . . . is a district in which neither Latinos nor Latino-preferred candidates are regularly defeated by a non-Latino bloc vote. To the contrary, Latino candidates who run in the area covered by the district generally prevail. Accordingly, the 2001 redistricting plan does not have the effect of diluting the minority vote in CD 28." J.S. App. 70.

### 2. *The Intent Claims*

The District Court separately analyzed Appellants' intentional vote dilution claims regarding CDs 28 and 51. *Id.*

As the District Court explained, "[i]n order to prove intentional vote dilution, plaintiffs must both demonstrate the requisite type of discriminatory intent . . . and establish dilutive effects on the voting potential of racial or ethnic minorities." *Id.* at 71 (citations omitted). The District Court looked at the evidence of discriminatory intent and concluded that the alleged intent of the Legislature "appears not to be of the type that the Supreme Court held necessary for an intentional vote dilution claim in *Bolden*, *Rogers*, and *Bandemer*." *Id.* at 75-76.[19] Although the District Court "strongly doubt[ed] that the 2001 redistricting statute was a purposeful device to further racial discrimination, in whole or in part," it

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In addition to these three elections, the District Court discussed the success of Lt. Governor Cruz Bustamante and Insurance Commissioner candidates Art Torres and Diane Martinez in the territory of CD 28. *Id.* at 66 n. 41. The District Court found the success of these statewide Latino candidates in the area of CD 28 to be less relevant than more local elections in assessing voter attitudes, but agreed that their success "demonstrates that Latino candidates are not routinely defeated in the precincts that comprise CD 28." *Id.*

[19] *See City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Davis v. Bandemer*, 478 U.S. 109 (1986).

did not rest its decision on that rationale. *Id.* at 76. Instead, the District Court rested its decision on the absence of dilutive effects.

As the District Court explained, "plaintiffs in vote dilution cases must . . . show a practical effect on the minority group's ability to elect representatives of choice" even if dilutive intent is shown. *Id.* at 79. The District Court labeled this effect requirement an "irreducible minimum in intentional vote dilution cases . . ." *Id.*

The undisputed evidence before the District Court was that in CD 28 "Latinos constitute a plurality," that "non-Latino voters have shown that they are willing to vote for Latino candidates," and that "Latino candidates receive a majority of the overall vote with some regularity." *Id.* at 80. With respect to CD 51, the District Court stated: "We need not deliberate as to whether a genuine question of fact exists . . . [because] Plaintiffs admit that the legislature established a district that is a fair opportunity district for Latinos." *Id.* at 81. Based on this and other undisputed evidence, the District Court found that "the most basic and necessary dilutive effect is lacking." *Id.* at 80.

**B. The District Court Held That The State Was Entitled To Summary Judgment On Appellants' *Shaw* Claims Because The Undisputed Evidence Demonstrated That The Challenged Districts Do Not Give Rise To The Type Of Harm That *Shaw* Is Designed To Remedy And The State Did Not Subordinate Traditional Districting Principles To Race.**

The District Court also granted the Senate's motion for summary judgment on Appellants' claim that CDs 28 and 51 violate the Fourteenth Amendment under the "racial gerrymander" doctrine set forth in *Shaw I* and its progeny. The District Court carefully reviewed this Court's precedents,

noting the particular harms that the *Shaw* doctrine is designed to address and the high burden Appellants face in pressing a claim under *Shaw*. J.S. App. 8-11. The District Court then explained why Appellants' evidence, even assuming it to be both true and admissible, was inadequate to establish such a cause of action. *Id.* at 11-38.

The District Court stated that, "these are not race-based districts that 'balkanize us into competing racial factions' or deliberately segregate voters into separate racial enclaves. *Shaw I*, 509 U.S. at 657. They cannot under any fair reading, be characterized as 'white districts' or 'Caucasian districts.' Nor are they districts that can only be reasonably understood to 'belong' to one ethnic or racial group." J.S. App. 13. "To the contrary," the District Court stated, "the districts at issue here are diverse and multi-ethnic: each contains a variety of racial and ethnic groups; none unites any single group of individuals within its boundaries for the purpose of permitting that group to exercise hegemony." *Id.* at 13-14.

The District Court continued: "There is no evidence that the legislature sought to ensure that voters of any particular race would dominate either district. Perhaps for this reason, one searches the record in vain for evidence of the type of harms that *Shaw* claims are designed to remedy—the 'representational' and 'expressive' harms described in *Shaw I*." *Id.* at 14-15. The District Court noted: "the message communicated by the redistricting plan is that in order to succeed in either of these districts a representative must build and maintain multi-racial coalitions." *Id.* at 15.

The District Court rejected Appellants' arguments that the shapes of the challenged districts and changes in boundary lines demonstrated impermissible consideration of race. *Id.* at 18. As the District Court observed, "the population shifts that are the subject of plaintiffs' *Shaw* claims represent a relatively minor portion of the districts at issue. Moreover, the removals of Latino voters were made at the margins or

perimeters . . . ." *Id.* Citing this Court's decision in *Easley v. Cromartie*, 532 U.S 234 (2001) ("*Cromartie II*"), the District Court held that "such discrete population shifts cannot constitute a *Shaw* violation." J.S. App. 19. "To adopt plaintiffs' sweeping construction of the racial gerrymandering doctrine," the District Court stated, "would render suspect virtually any legislative decision regarding the districts in which to place areas or groups of precincts that are predominantly populated by one racial or ethnic group. Such an approach would render meaningless the guarantee that the *Shaw* doctrine 'does not throw into doubt the vast majority of the Nation's 435 congressional districts . . . even though race may well have been considered in the redistricting process.'" *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring)).

The District Court also rejected Appellants' *Shaw* theory because the relief requested—districts that would be more reliably Latino—was inconsistent with a *Shaw* remedy. "Plaintiffs contend that a group of Latino residents was excluded from each of CD 28 and CD 51 in order to ensure that the number of Latino residents in those districts did not rise above a certain percentage. To the extent that this is true, it implicates the Equal Protection Clause as a claim of constitutional vote dilution, not as an 'analytically distinct' claim of racial gerrymandering. What plaintiffs seek as a *Shaw* remedy is a redistricting plan that contains the maximum number of majority-Latino districts possible. This is not a requirement of constitutional districting." J.S. App. 19-20 (citing, *inter alia*, *Miller*, 515 U.S. at 915; *De Grandy*, 512 U.S. at 1017).

Finally, the District Court rejected Appellants' *Shaw* claims for the independent reason that "Plaintiffs had put forth no evidence that traditional districting principles were not followed and were subordinated to racial considerations." J.S. App. 20 (title caps omitted). In that regard, the District

Court found (1) that both CD 28 and CD 51 "are reasonably compact and contiguous"; (2) that neither is irregular in shape; (3) that undisputed evidence established that AB 632 "achieved the precise mathematical equality in congressional district populations" required by this Court's precedents; (4) that AB 632 decreased the number of city-splits in congressional districts statewide; and (5) that the record contained "specific, uncontroverted evidence that the traditional districting principles applied statewide were not abandoned, but rather were rigorously applied in the configuration of both CD 51 and CD 28." *Id.* at 22-38.

With respect to CD 51, the entirety of Imperial County, rather than particular enclaves, was added to the district. *Id.* at 23. The addition of this territory necessitated the removal of other parts of the district in order to achieve population equality. *Id.* These boundary changes showed respect for existing communities of interest, preserved the essential core of the previous district, and were accomplished without unnecessary city splits. *Id.* at 23-24. As a result of the changes, the "dominant political party's electoral base in a politically-marginal district that abuts CD 51" was strengthened, providing an explanation for the change in district lines that relates to politics, not race. *Id.* at 24-25. Given the predominant role that race played in Appellants' proposals, the District Court unsurprisingly found that AB 632 adheres to traditional districting criteria more strictly than the plans advanced by Appellants and their counsel. *Id.* at 30 n.19.

As to CD 28, the District Court found "abundant and uncontroverted evidence in the record" that traditional districting principles were followed and were not subordinated to race. *Id.* at 35. In particular, the court found that "one important reason for the new district lines was to respond to requests by residents of the southern San Fernando Valley (the Valley) to be included in the district of Rep. Berman," who had represented southern portions of the Valley "for

decades as a member of the California Assembly and in Congress," but who had been removed from those areas as a result of a plan adopted by Special Masters in California in 1991. *Id.* at 34-36. According to the District Court, "[t]he current redistricting plan thus modified the Special Masters' Plan by reestablishing, in part, Rep. Berman's traditional district . . . and conform[s] to traditional districting principles to at least the same degree as the district created by the Special Masters and the alternative district proposed by plaintiffs." *Id.* at 35-36. The court further found that Appellants' evidence of racial intent was "essentially equivalent to the statement the Supreme Court found insufficient to support a *Shaw* claim in *Cromartie II*." *Id.* at 34.

For all of these reasons, the District Court granted summary judgment for Defendants.

## ARGUMENT:

### THE JUDGMENT BELOW SHOULD BE SUMMARILY AFFIRMED OR THIS APPEAL DISMISSED

The decision of the three-judge District Court should be summarily affirmed, or the appeal dismissed for want of a substantial federal question. The undisputed facts demonstrate that there are no issues requiring plenary Supreme Court review. "Time and again [this Court has] emphasized that reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Voinovich v. Quiltner*, 507 U.S. 146, 156-57 (1993) (citations omitted). Moreover, as this Court stated in *Miller*, "courts must . . . recognize . . . the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of a litigation and determining whether to permit discovery or

trial to proceed." *Miller*, 515 U.S. at 916-17. It is difficult to conceive of a case more clearly calling for summary adjudication, and for summary disposition by this Court.

### A. The District Court Properly Entered Summary Judgment Against Appellants' Vote Dilution Claims

#### 1. *Appellants' Theories Wholly Ignore This Court's Constitutional Vote Dilution Precedents*

Appellants argued that AB 632 violated the Constitution's prohibition against vote dilution. Seminal cases setting forth the constitutional standard include: *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 412 U.S. 755 (1973); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Rogers v. Lodge*, 458 U.S. 613 (1982); and *Davis v. Bandemer*, 478 U.S. 109 (1986). None of these cases is mentioned in the Jurisdictional Statement. Appellants have now abandoned any claim based on those precedents, apparently because they understand that they cannot meet the evidentiary burdens facing plaintiffs in such cases. *See, e.g., Whitcomb*, 403 U.S. at 160 (finding no vote dilution despite proof that districting plan resulted in protected class of voters having "no legislative seats assigned to them"); *Rogers*, 458 U.S. at 623-25 (discussing requirement of presenting evidence of "exclusion from the political process"); *Bandemer*, 478 U.S. at 139 (noting that claims of intentional vote dilution based on race have been upheld only where "the racial minorities . . . had essentially been shut out of the political process").

#### 2. *Appellants' "Intent Alone" Theory Has Been Consistently Rejected By The Courts*

The theory that Appellants do pursue in this appeal is an "intent alone" theory. Appellants argue that a reduction in Latino voting strength in a district is, in and of itself, unlawful if the Legislature intended that result to benefit a non-Latino incumbent. Such an intent, Appellants contend,

violates the Voting Rights Act even if: (1) Latino candidates and Latino-preferred candidates regularly win elections in the precincts comprising the challenged district; and (2) there is an absence of racial bloc voting that defeats Latino-preferred candidates.

The contention at the core of Appellants' argument is: "[T]he [*Gingles*] Court never stated or even suggested that *intent alone* could not, as it had before the [1982 amendments to the Voting Rights Act], prove an independent violation of section 2." J.S. 14 (emphasis added). Appellants reiterate: "*[I]ntent all by itself* continues, after *Gingles* as before it, to amount to a violation of the Voting Rights Act." *Id.* at 15 (emphasis added). Appellants ignore the many cases that reject this very argument.

Appellate courts have consistently rejected "intent only" claims under Section 2 of the Voting Rights Act. The Eighth Circuit in *African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345 (8th Cir. 1995), stated: "We reject . . . plaintiff's argument that [a] § 2 'intent' claim does not require proof of discriminatory effect." *Id.* at 1356 n.18. Similarly, the Eleventh Circuit in *Johnson v. DeSoto County Board of Commissioners*, 72 F.3d 1556 (11th Cir. 1996), reversed a district court's decision holding that "proof of discriminatory intent is sufficient to establish a § 2 violation." *Id.* at 1561. The *Johnson* court concluded that the district court's holding was "inconsistent with the Supreme Court's decision in *Voinovich*."[20] *Id.* Both the Eighth and Eleventh Circuits relied on the following passage from *Voinovich* in rejecting the notion of an "intent only" Section 2 claim: "§ 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a

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[20] *See also Brooks v. Miller*, 158 F.3d 1230, 1237 (11th Cir. 1998) ("[D]iscriminatory intent alone, in the absence of a showing of discriminatory effect, is insufficient to establish a violation of § 2").

protected class the equal opportunity to elect its candidate of choice does it violate § 2." *Voinovich*, 507 U.S. at 155 (emphasis in original).[21]

Appellants' "intent with no effects" Voting Rights Act claim is therefore inconsistent with settled law, while the ruling below is consistent with the rulings of this Court and with the conclusions of other federal courts. Plenary review is unnecessary.

### 3. *Appellants' "Lessened Effect" Theory Is Not Supported By Caselaw*

Appellants fall back on an argument that a plaintiff's burden of proving dilutive effect is "lessened" when intentional discrimination is alleged and that the *Gingles* standard "is a higher standard" that does not apply in such situations. J.S. 15-16. Attempting to find some "effect," Appellants argue that a district with fewer Latino voters has less Latino voting strength than a district with more Latino voters. *Id.* While impeccable as a matter of logic, this is, as a legal matter, a wholly insufficient basis on which to strike down a State's redistricting plan. All of the congressional districts in California after the 2001 redistricting differed from the districts that existed before. When an "old" district is compared to a "new" district, the percentage of Latino

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[21] *See also Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) ("[T]he statute proscribes intentional discrimination only if it has a discriminatory effect, but proscribes practices with discriminatory effect, whether or not intentional. This new 'results' criterion provides a powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination."); *Gingles*, 478 U.S. at 44 ("The intent test was repudiated [in the 1982 amendments] for three principal reasons—it is 'unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities,' it places an 'inordinately difficult' burden of proof on plaintiffs, and it 'asks the wrong question.'").

voters is likely to be either higher or lower, and population shifts among different groups are inevitable. This is especially true here because California's population had to be allocated to fifty-three districts in 2001, rather than the fifty-two districts of the previous decade.

#### 4. *Appellants' Reliance On Constitutional Cases Outside The Realm Of Redistricting Cannot Be Used To Create A Claim Here*

In sections II.C and II.D of their Jurisdictional Statement, Appellants discuss Equal Protection Clause cases outside the redistricting context, ranging from *Korematsu v. United States*, 323 U.S. 214 (1944), to *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), to *Adarand Construction Inc. v. Pena*, 515 U.S. 200 (1995). J.S. 17-20. These sections of the Jurisdictional Statement do not appear to advance a recognizable constitutional theory that Appellants contend should be applied in the context of redistricting.

There is no shortage of Supreme Court cases applying the Equal Protection Clause to the redistricting context, although Appellants consistently avoid them. Those cases, as Appellants point out, recognize that redistricting is different from other governmental decisions because "map-drawers may be aware of race." *Id.* at 18. As *Shaw I* explained: "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw I*, 509 U.S. at 646 (emphasis in original); *see also* Pamela S. Karlan & Daryl J. Levinson, "Why Voting Is Different," 84 Cal. L. Rev. 1201, 1203 (1996).

### 5. *Appellants' Reliance On* De Grandy *And* Bossier Parish *Is Misplaced*

Appellants argue that the District Court decision is "hopelessly in tension" with *De Grandy* and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) ("*Bossier Parish II*"). J.S. 20. This argument is without merit.

The District Court did not reach the proportionality question addressed in *De Grandy* because, unlike in *De Grandy*, here the threshold *Gingles* pre-conditions were not satisfied. Had the District Court reached the proportionality question, it could well have concluded, as this Court concluded in *De Grandy*, that the challenged plan was in compliance with Section 2 under the totality of the circumstances. As a result of the November 2002 election, of the fifteen congressional districts in Los Angeles County, five members of Congress are Latino. J.S. App. 72. That proportion exceeds the Latino proportion of registration and citizen voting-age population in the County. *Id.*

Appellants contend that *Bossier Parish II* "seems, by fair implication, to establish" that the District Court's interpretation of Section 2 "is incorrect as a matter of statutory construction." J.S. 21. *Bossier Parish II* is a Section 5 case, and Appellants' reliance on Section 5 law is misplaced. Appellants concede that, "[u]nlike section 5 of the Voting Rights Act, section 2 does not refer expressly to 'purpose' and 'effect' . . ." *Id.* at 22. But according to Appellants, the failure to mention "purpose" and "effect" in Section 2 requires the Court to determine "whether section 2 implicitly incorporates these two analytically distinct notions of abridgement conjunctively or disjunctively." *Id.* No such determination is required. Section 2 does not "implicitly incorporate" any of the text of Section 5. Sections 2 and 5 "combat different evils and, accordingly, . . . impose very different duties upon the States." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997).

### B. The District Court Correctly Held That Defendants Were Entitled To Summary Judgment On Appellants' Claims Under *Shaw v. Reno*.

*Shaw I* recognized a cause of action to challenge districts that are "unexplainable on grounds other than race." *Cromartie II*, 532 U.S. at 242 (quoting *Shaw I*, 509 U.S. at 644); *Miller*, 515 U.S. at 905 (same); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (*"Cromartie I"*) (same). "[T]he party attacking the legislature's decision bears the burden of proving that racial considerations are 'dominant and controlling.'" *Cromartie II*, 532 U.S. at 257 (citing *Miller*, 515 U.S. at 913). "That party must also show that its proposed alternative "would have brought about significantly greater racial balance." *Id.* at 258; *see infra* note 23. Mere "consciousness of race does not give rise to a claim of racial gerrymandering where race is considered along with traditional redistricting principles such as compactness, contiguity, and political boundaries." *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994), *summarily aff'd*, 515 U.S. 1170 (1995).

The burden of proof on plaintiffs seeking to demonstrate a *Shaw* violation is a "demanding one." *Cromartie II*, 532 U.S. at 241 (citing *Miller*, 515 U.S. at 928 (O'Connor, J., concurring)). It is "presumed" that States have acted in good faith and drawn district boundaries in accordance with their customary districting principles. *Miller*, 515 U.S. at 915; *see also id.* at 928 (O'Connor, J., concurring). To overcome this presumption, a claimant must make "a showing sufficient to support" its *Shaw* allegations. *Id.* at 915. "Rarely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 252 (1977). The *Shaw* doctrine "does not throw into doubt the vast majority of the Nation's 435 congressional districts." *Miller*, 515 U.S. at

928 (O'Connor, J., concurring). "That is so even though race may well have been considered in the redistricting process." *Id.* at 928-29 (citing *Shaw I*, 509 U.S. at 646).

Unlike a vote dilution claim, which is concerned with whether district lines prevent minority voters from participating equally in the political process, *Shaw I* is intended to remedy so-called "representational" or "expressive" harms. As this Court has explained, "[w]hen a district obviously is created solely to effectuate the perceived common interests of *one racial group*, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw I*, 509 U.S. at 648 (emphasis added); *see also* Richard H. Pildes & Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election District Appearances After *Shaw v. Reno*," 92 Mich. L. Rev. 483, 527-29 (1993).

It is appropriate to grant summary judgment on claims arising under *Shaw*. *See Miller*, 515 U.S. at 916-17; *cf. Cromartie II*, 532 U.S. at 257 (reversing trial court's grant of judgment for *Shaw* plaintiffs after trial where only a "modicum of evidence" supported their claims). Indeed, California's redistricting plan following the 1990 census was also challenged under *Shaw*, summary judgment was granted, and this Court summarily affirmed. *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily aff'd*, 515 U.S. 1170 (1995).

The facts of this case are far removed from those that give rise to liability under *Shaw*. The districts at issue here are multi-ethnic in character; they are not race-based districts. J.S. App. 13-14.[22] "Their demographic make-up . . . conveys

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[22] The raw population data are provided above at page 7. Voting-age population is similarly diverse; CD 51 has a voting-age population that is 49% Latino, 25.1% white, 13.8% Asian, and 9.7% African-American; CD

no message that constitutional principles have been disregarded, or that the legislature sanctions racial classifications." *Id.* at 16. Moreover, as the District Court found, no bizarrely shaped districts are at issue here, and the State adhered to traditional districting criteria. *Id.* at 18, 20-38. Appellants admit that the districts they challenge are not "segregated districts," but nonetheless insist that they are entitled to a trial on their *Shaw* claims. J.S. 25.

No decision of this Court, or of any other court, holds that the *Shaw* doctrine may be used to require a state to dismantle ethnically diverse districts that adhere to traditional districting principles and to substitute districts in which a single ethnic group will reliably dominate—the remedy Appellants seek here. *See, e.g., id.* at 20, 24 n.16, 37, 59 (explaining Dr. Kousser's theory and the remedy Appellants' seek); *see supra* note 8.

Contrary to Appellants' assertion, the District Court did not hold that the *Shaw* doctrine can never apply to multi-ethnic districts. Rather, on the particular facts of this case, the District Court found that the districts in question cannot be understood as belonging to one ethnic or racial group, J.S. App. 13, and that "[t]here is no evidence that the legislature sought to ensure that voters of any particular race would dominate either district," *id.* at 14. Moreover, neither district sends a message to elected representatives to ignore members of any particular racial or ethnic group, *id.* at 15, and the districts as a whole do not "send a message that the legislature sanctions racial classifications," *id.* at 16.

Even if, contrary to the record, the District Court had held that multi-ethnic districts can never violate *Shaw*, such a holding would be fully in keeping with this Court's precedents. As Appellants' own expert observed in the report their

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28 has a voting-age population that is 49.2% Latino, 37.2% white; 6.9% Asian, and 4.3% African-American. J.S. App. 14.

counsel relied upon in lobbying the Legislature, the "concerns that the Supreme Court mentioned in *Shaw v. Reno* and subsequent related opinions cannot apply to districts in which there is no ethnic majority of voters." *Id.* at 15 n.11. This Court's *Shaw* cases are overwhelmingly concerned with the harms caused when redistricting is accomplished for the sole purpose of ensuring the political domination of a single ethnic group. *See, e.g., Shaw I*, 509 U.S. at 648; *Miller*, 515 U.S. at 911-12. Furthermore, this Court has encouraged the creation of districts that contain "greater racial balance." *Cromartie II*, 532 U.S. at 258; *De Grandy*, 512 U.S. at 1020 (stating that "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground"). This case does not call for reconsideration of these principles.[23]

Finally, Appellants argue that the District Court erred in holding that *Shaw* plaintiffs are required to show the subordination of traditional redistricting principles to racial concerns. J.S. 25-27. But the sole case they cite for this proposition, *Cromartie I*, expressly states that "[t]o carry their burden, [*Shaw* plaintiffs] were obliged to show—using direct or circumstantial evidence, or a combination of both—that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Cromartie I*, 526 U.S. at 547 (citations and internal quotation omitted); *see also Cromartie II*, 532 U.S. at 241 (stating that *Shaw* plaintiffs "must show at a minimum that the 'legislature subordinated

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[23] Having ruled that Defendants were entitled to summary judgment, the District Court had no occasion to consider the Senate's argument that Appellants' *Shaw* claim is also barred because Appellants failed to show the possibility of creating a district with "significantly greater racial balance." *Cromartie II*, 532 U.S. at 258; *see also generally* D. Ct. Docket No. 176 (Senate Defendants' Motion For Partial Summary Judgment Re: San Diego Congressional Districts). This argument provides an alternative basis for affirming the District Court's decision rejecting Appellants' *Shaw* claims.

traditional race-neutral districting principles . . . to racial considerations'") (quoting *Miller*, 515 U.S. at 916). Accordingly, the District Court committed no error in holding that the lack of *any evidence* that the Legislature subordinated traditional redistricting principles to race justified the granting of the Senate's summary judgment motions in this case. J.S. App. 20-38.

## CONCLUSION

Appellants' counsel persistently warned the California Legislature that litigation would be the price of any legislative failure to accede to the unusual racial standards they advocated. And so it was. But the District Court unanimously responded by applying settled legal principles to the undisputed facts and summarily disposed of Appellants' claims, as should this Court on appeal. For the foregoing reasons, the judgment below should be summarily affirmed or this appeal dismissed for want of any substantial federal question.

Respectfully submitted,

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December 2, 2002

as President Pro Tempore of the California State Senate; ROBERT HERTZBERG, in his official capacity as Speaker of the California State Assembly,

*Defendants.*

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FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1) Voting Rights Act
2) Fourteenth Amendment

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action, which raises federal constitutional and statutory claims, under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 2201, and 2202; as well as under 42 U.S.C. §§ 1973 and 1983. Injunctive and declaratory relief are authorized by these provisions of federal law.

2. Venue is proper in this district under 28 U.S.C. § 1391(b) in that at least one defendant resides in this district and all defendants reside in this state. Venue is also proper in this district under section 1391(b) because a substantial part of the events or omissions giving rise to the claims occurred or imminently will occur in this district.

3. Plaintiffs request that this court convene and appoint a district court of three judges to hear and determine this action, as required by 28 U.S.C. § 2284(a) because this action challenges the constitutionality of the apportionment of congressional districts in the state of California.

INTRODUCTION

4. This action, which is brought under the United States Constitution and the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq., seeks declaratory and injunctive relief against the California state government officials (referred to as

"Defendants") who are charged with overseeing and conducting elections for congressional and state legislative seats and/or for redrawing congressional and state legislative district boundaries after each decennial census.

5. Plaintiffs seek an order prohibiting Defendants from undertaking any action to conduct congressional and state senate elections under the congressional and state senate redistricting plans passed by the California Legislature in September 2001 and signed by the governor on September 27, 2001. Both of these plans deny the Latino community an equal opportunity to participate in the political process and to elect candidates of their choice. Plaintiffs also seek an order requiring Defendants to conduct elections in 2002 and election years after under the plan that Plaintiffs propose.

## PARTIES

6. The individual Plaintiffs are all Latino citizens of the United States and residents of the State of California, duly registered to vote in elections in California.

7. Plaintiff MARIA CANO is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Cano resides in Congressional District 28 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Cano is Latino/Hispanic.

8. Plaintiff PAULA RANGEL is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Rangel resides in Congressional District 28 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Rangel is Latino/Hispanic.

9. Plaintiff MARIA CALLEROS is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Calleros resides in Congressional District 28 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Calleros is Latino/Hispanic.

10. Plaintiff NORMA E. RAMIREZ is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Ramirez resides in Congressional District 28 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Ramirez is Latino/Hispanic.

11. Plaintiff MARGO MUNOZ is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Munoz resides in Congressional District 28 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Munoz is Latino/Hispanic.

12. Plaintiff BENNIE G. CORONA is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Corona resides in Congressional District 28 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Corona is Latino/Hispanic.

13. Plaintiff MYRON GARCIA is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Myron Garcia resides in Congressional District 27 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Myron Garcia is Latino/Hispanic.

14. Plaintiff FRANK DIAZ is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Diaz resides in Congressional District 27 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Diaz is Latino/Hispanic.

15. Plaintiff CONSUELO E. RODRIGUEZ is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Rodriguez resides in Congressional District 27 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Rodriguez is Latino/Hispanic.

16. Plaintiff JOSE RUELAS is a citizen of the United States and a registered voter in California, County of Los

Angeles. Plaintiff Ruelas resides in Congressional District 28 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Ruelas is Latino/Hispanic.

17. Plaintiff RACQUEL TORRES is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Torres resides in Congressional District 27 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Torres is Latino/Hispanic.

18. Plaintiff ENRIQUE F. ARANDA is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Aranda resides in State Senate District 27 under the 2001 redistricting plan adopted by the state. Plaintiff Aranda is Latino/Hispanic.

19. Plaintiff JOSEPHINE SANTIAGO is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Santiago resides in State Senate District 27 under the 2001 redistricting plan adopted by the state. Plaintiff Santiago is Latino/Hispanic.

20. Plaintiff ANTONIO M. LOPEZ is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Lopez resides in State Senate District 30 under the 2001 redistricting plan adopted by the state. Plaintiff Lopez is Latino/Hispanic.

21. Plaintiff JOSE R. PACHECO is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff Pacheco resides in State Senate District 27 under the 2001 redistricting plan adopted by the state. Plaintiff Pacheco is Latino/Hispanic.

22. Plaintiff LUIS NATIVIDAD is a citizen of the United States and a registered voter in California, County of San Diego. Plaintiff Luis Natividad resides in Congressional District 51 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Luis Natividad is Latino/Hispanic.

23. Plaintiff MARISOL NATIVIDAD is a citizen of the United States and a registered voter in California, County of San Diego. Plaintiff Marisol Natividad resides in Congressional District 51 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Marisol Natividad is Latino/Hispanic.

24. Plaintiff LUIS GARCIA is a citizen of the United States and a registered voter in California, County of San Diego. Plaintiff Luis Garcia resides in Congressional District 53 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Garcia is Latino/Hispanic.

25. Plaintiff LUZ PALOMINO is a citizen of the United States and a registered voter in California, County of San Diego. Plaintiff Luz Palomino resides in Congressional District 53 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Luz Palomino is Latino/Hispanic.

26. Plaintiff SILVIA PALOMINO is a citizen of the United States and a registered voter in California, County of San Diego. Plaintiff Silvia Palomino resides in Congressional District 53 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Silvia Palomino is Latino/Hispanic.

27. Plaintiff IGNACIO LEON is a citizen of the United States and a registered voter in California, County of San Diego. Plaintiff Leon resides in Congressional District 53 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Leon is Latino/Hispanic.

28. Plaintiff JOAQUIN GALAN is a citizen of the United States and a registered voter in California, County of San Diego. Plaintiff Galan resides in Congressional District 53 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Galan is Latino/Hispanic.

29. Plaintiff ERNESTO BUSTILLOS is a citizen of the United States and a registered voter in California, County of San Diego. Plaintiff Bustillos resides in Congressional District 53 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Bustillos is Latino/Hispanic.

30. Plaintiff CATHY ESPITIA is a citizen of the United States and a registered voter in California, County of San Diego. Plaintiff Espitia resides in Congressional District 53 under the 2001 congressional redistricting plan adopted by the state. Plaintiff Espitia is Latino/Hispanic.

31. Plaintiff JOSE A. HERNANDEZ, PH.D is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff HERNANDEZ resides in Congressional District 28 under the 2001 congressional redistricting plan adopted by the state. Plaintiff HERNANDEZ is Latino/Hispanic.

32. Plaintiff WENDY ESTEVEZ is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff ESTEVEZ resides in Congressional District 28 under the 2001 congressional redistricting plan adopted by the state. Plaintiff ESTEVEZ is Latino/Hispanic.

33. Plaintiff IMELDA LAVOIE is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff LAVOIE resides in Congressional District 28 under the 2001 congressional redistricting plan adopted by the state. Plaintiff LAVOIE is Latino/Hispanic.

34. Plaintiff CHRISTIAN MALDONADO is a citizen of the United States and a registered voter in California, County of Los Angeles. Plaintiff LAVOIE resides in Senate District 27 under the 2001 congressional redistricting plan adopted by the state. Plaintiff MALDONADO is Latino/Hispanic.

35. Plaintiff SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT (SVREP) is a non-profit organization dedicated to advancing the interests of Latinos in the United States. Among its organizational objectives is the political empowerment of Latinos by increasing civic engagement in the American electoral system. SVREP pursues this objective through several means, including voter registration and voter education drives. Because many of the constituents SVREP serves reside in areas affected by the Defendants' violations, SVREP's organizational objectives are impeded by the violations alleged here.

36. Plaintiff MEXICAN AMERICAN POLITICAL ASSOCIATION, SAN FERNANDO VALLEY CHAPTER (MAPA SFV), is a non-profit organization dedicated to the constitutional and democratic principle of political freedom and representation for the Mexican and Hispanic people of the United States of America. Among its organizational objectives is the political empowerment of the Latino community in the United States. MAPA SFV pursues this objective through several means, including voter registration and voter education drives in Latino communities. Because many of its members and many of the constituents MAPA SFV serves reside and are registered voters or potential registered voters in areas affected by the Defendants' violations, MAPA SFV's organizational objectives are impeded by the violations alleged here.

37. Plaintiff MEXICAN AMERICAN POLITICAL ASSOCIATION, IMPERIAL VALLEY CHAPTER (MAPA IV), is a non-profit organization dedicated to the constitutional and democratic principle of political freedom and representation for the Mexican and Hispanic people of the United States of America. Among its organizational objectives is the political empowerment of the Latino community in the United States. MAPA IV pursues this objective through several means, including voter registration and voter

education drives in Latino communities. Because many of its members and many of the constituents MAPA IV serves reside and are registered voters or potential registered voters in areas affected by the Defendants' violations, MAPA IV's organizational objectives are impeded by the violations alleged here.

38. Plaintiff CALIFORNIA LEAGUE OF UNITED LATIN AMERICAN CITIZENS (CALIFORNIA LULAC), is a non-profit organization dedicated to advancing the economic condition, educational attainment, political influence, health and civil rights of the Hispanic population of the United States. Among its organizational objectives is the political empowerment of the Latino community in the United States. CALIFORNIA LULAC pursues this objective through several means, including voter registration and voter education drives in Latino communities. Because many of its members and many of the constituents CALIFORNIA LULAC serves reside and are registered voters or potential registered voters in areas affected by the Defendants' violations, CALIFORNIA LULAC's organizational objectives are impeded by the violations alleged here.

39. Plaintiff LEAGUE OF UNITED LATIN AMERICAN CITIZENS, DISTRICT 17 (LULAC Dist. 17), is an organization dedicated to advancing the economic condition, educational attainment, political influence, health and civil rights of the Hispanic population of the United States. Among its organizational objectives is the political empowerment of the Latino community in the United States. LULAC Dist. 17 pursues this objective through several means, including voter registration and voter education drives in Latino communities. Because many of the constituents LULAC Dist. 17 serves reside in areas affected by the Defendants' violations, LULAC Dist. 17's organizational objectives are impeded by these violations.

40. Plaintiff LEAGUE OF UNITED LATIN AMERICAN CITIZENS, SAN FERNANDO VALLEY, COUNCIL 3019 (LULAC Council 3019), is an organization dedicated to advancing the economic condition, educational attainment, political influence, health and civil rights of the Hispanic population of the United States. Among its organizational objectives is the political empowerment of the Latino community in the United States. LULAC Council 3019 pursues this objective through several means, including voter registration and voter education drives in Latino communities. Because many of its members and many of the constituents LULAC Council 3019 serves reside and are registered voters or potential registered voters in areas affected by the Defendants' violations, LULAC Council 3019's organizational objectives are impeded by the violations alleged here.

41. Defendant GRAY DAVIS is the duly elected Governor of the State of California. The California Constitution vests in Defendant Davis, as Governor, the supreme executive power of the state. Defendant Davis is charged with seeing that the law is faithfully executed. Defendant Davis is presented and may either sign or veto each bill passed by the California Legislature. Defendant Davis is sued in his official capacity.

42. Defendant CRUZ BUSTAMANTE is the duly elected Lieutenant Governor of the State of California. As Lieutenant Governor, Defendant Bustamante is the President of the California State Senate. Defendant Bustamante is sued in his official capacity.

43. Defendant BILL JONES is the duly elected Secretary of State of the State of California. As Secretary of State, Defendant Jones is charged with administering the election laws of the state. Defendant Jones is sued in his official capacity.

44. Defendant JOHN BURTON is the President Pro Tempore of the California State Senate. As such, Defendant Burton presides over and directs the deliberations of the State Senate on all legislation. The California Constitution charges the State Senate, as one of the houses of the California Legislature, with adjusting the congressional and state legislative district lines in the year following each decennial census. Defendant Burton is sued in his official capacity.

45. Defendant ROBERT HERTZBERG is the Speaker of the California State Assembly. As such, Defendant Hertzberg presides over and directs the deliberations of the State Assembly on all legislation. The California Constitution charges the State Assembly, as one of the houses of the California Legislature, with adjusting the congressional and state legislative district lines in the year following each decennial census. Defendant Hertzberg is sued in his official capacity.

## LEGAL FRAMEWORK

46. The Equal Protection clause of the Fourteenth Amendment to the United States Constitution prohibits unjustified intentional discrimination in the form of racial gerrymandering by Defendants, acting under color of state law, in the construction of congressional and state legislative electoral districts.

47. Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, prohibits the use of electoral policies, procedures or devices that have the effect of diluting the voting strength of racial minorities. The Act requires electoral districts to afford Latinos/Hispanics an equal opportunity to participate in the political process and to elect candidates of their choice or otherwise to influence the outcome of elections.

## FACTUAL ALLEGATIONS

48. The most significant change in California's population between the 1990 census and the 2000 census is the increase in the Latino population, which grew from approximately 7.7 million persons to 11.0 million persons, an increase of over 42 percent. The addition of 3.3 million Latinos accounts for over 80 percent of the increase in California's entire statewide population. In comparison, the non-minority or white population dropped from 76 percent of the population in 1980 to 57 percent in 1990, and to 46.7 percent in 2000.

49. On March 28, 2001, the United States Census Bureau released the 2000 census population counts for California, including a breakdown for race and geographic areas including each county, minor civil division, census tract, block group, and block. The Census Bureau reported California's total population at 33,871,648; California's Latino/Hispanic population at 10,966,566, or 32.4 percent; California's Asian American/Pacific Islander population at 3,752,596, or 11.1 percent; and California's African American population at 2,181,926, or 6.4 percent of the state's total population.

50. On September 12 and 13, 2001, the California Legislature passed Assembly Bill 632, a bill encompassing the redistricting plan for the election of representatives to the United States Congress and the redistricting plan for the election of members of the California State Senate.

51. On September 27, 2001, Defendant Davis signed Assembly Bill 632, thus enacting the redistricting plans for congressional and State Senate electoral districts.

52. There are 40 single-member districts in the plan for the election of California State Senate members.

53. There are 53 single-member districts in the plan for the election of representatives to the United States Congress.

San Fernando Valley

54. The congressional redistricting plan enacted by the Legislature for the 2002 elections contains nine districts that afford geographically compact Latino populations an equal opportunity to elect candidates of choice. An additional district could have been drawn in the vicinity of Congressional Districts 27 and 28 that would afford a geographically compact Latino population the equal opportunity to elect candidates of choice.

55. Instead, the Legislature shifted what had been Congressional District 26 in the 1990s (what would become Congressional District 28 under the 2001 plan) to the south in order to pick up heavily non-Latino areas, and shifted heavily Latino areas that were previously in the District, such as Mission Hills, Sylmar, Sun Valley, and Van Nuys, to neighboring (and surrounding) Congressional District 27. This has the effect of depriving the Latino population in either district of an equal opportunity to elect candidates of choice.

56. Defendants and the State Legislature intentionally and purposefully gerrymandered congressional district lines in the San Fernando Valley with the intent of diluting the voting strength of Latino voters in what was formerly Congressional District 26 under the district plan followed for the last ten years, and to prevent the Latino population from attaining too much electoral strength in either Congressional District 27 or Congressional District 28.

San Diego

57. Congressional District 51 is a district with a majority Latino population. However, in drawing the district's boundaries, Defendants and the State Legislature deliberately left out heavily Latino neighborhoods, such as those known

as Barrio Logan, Logan Heights, Golden Hills, and City Heights, in order to prevent the district from attaining a Latino population level that might threaten the incumbent.

58. Defendants and the State Legislature thus intentionally and purposefully gerrymandered congressional district lines in the San Diego area with the intent of diluting the voting strength of Latino voters in Congressional Districts 51 and 53, and to prevent the Latino population from attaining too much electoral strength in Congressional 51 District.

Southeast Los Angeles County

59. The current State Senate plan, enacted by the Legislature for the 2002 elections, contains seven districts that afford geographically compact Latino populations an equal opportunity to elect candidates of choice. One additional district could have been drawn in the vicinity of Senate District 27 that would afford a geographically compact Latino population the equal opportunity to elect candidates of choice.

60. Instead, the adopted redistricting plan concentrates more of the area's heavily Latino neighborhoods in adjacent districts, such as Senate District 30, thus leaving Senate District 27 with a decided non-Latino majority. This has the effect of depriving the Latino population in Senate Districts 27 and 30 of an equal opportunity to elect candidates of choice.

Latinos and Voting in California

61. Legislative and statewide elections in California, including district elections in the areas in and around Congressional Districts 27, 28, 51, and 53, and in the area in and around Senate Districts 27 and 30, are characterized by racially polarizing voting.

62. Latinos in California, including the areas in which Latino majority districts can be created, are politically cohesive.

63. In California, non-Latino majority districts, including districts in the areas in and around Congressional Districts 27, 28, 51, and 53, and in the area in and around State Senate Districts 27 and 30, non-Latinos vote sufficiently as a bloc to enable them—in the absence of special circumstances—usually to defeat the Latino voters' preferred candidates.

64. The state of California has a long history of discrimination against Latino minority voters residing in the state and of disenfranchisement of qualified Latino minority voters.

65. Latinos/Hispanics in California have been subject to widespread discrimination for many years that touches on their ability to participate in the political process.

66. Latinos/Hispanics in California continue to bear the effects of discrimination in areas such as education, employment, housing and health, which depresses their socio-economic status and hinders their participation in the political process.

67. Political campaigns in California have been frequently characterized by overt or subtle racial appeals.

68. Currently, Latinos/Hispanics are severely underrepresented in the California congressional delegation and in the State Senate.

69. The redistricting plans adopted and being implemented by Defendants for the 2002 election of members to Congress and Senate dilute the Latino community's opportunity to elect candidates of choice, resulting in an unequal opportunity to participate in the political process.

70. As a result of the intentional discrimination against Latino voters in the San Fernando Valley and in the San Diego area, Latinos have less of an opportunity to participate in the political process and to elect candidates of choice.

71. At all relevant times, Defendants acted and continue to act under color of state law.

## INJURY TO PLAINTIFFS

72. The intervention of this Court is now necessary to protect Plaintiffs' statutory and constitutional rights.

73. Unless the relief requested in this cause is granted, Plaintiffs will suffer denial of equal rights and protection, and a dilution of their statutorily protected right to vote. Plaintiffs have no adequate remedy at law. They have suffered, and continue to suffer, immediate and irreparable injury in the deprivation of an equal opportunity to vote and to elect candidates of choice.

## CLAIMS FOR RELIEF

### FIRST CLAIM FOR RELIEF

(Violation of Voting Rights Act, 42 U.S.C. § 1973 et seq.)

74. Plaintiffs reallege paragraphs 1 through 64 above and incorporate the same as though fully set forth here.

75. The redistricting plans adopted and being implemented by Defendants for the 2002 election for members of the California congressional delegation, and for members of the California State Senate, will result in a denial or abridgement of the right to vote of Plaintiffs on account of their race, color, or ethnicity, by having the effect of canceling out or minimizing their individual voting strength as minorities in California.

76. Defendants and the State Legislature adopted the congressional district plan for the election of members of the United States Congress in the San Fernando Valley and in the San Diego area with the discriminatory purpose of fragmenting the Latino population in order to dilute the effect of the Latino vote in future elections.

77. The redistricting plans do not afford Plaintiffs an equal opportunity to participate in the political process and to elect representatives of their choice, and deny Plaintiffs the right to vote in elections without distinction of race, color, or previous condition of servitude, all in violation of 42 U.S.C. §§ 1971(a) and 1973.

## SECOND CLAIM FOR RELIEF

(Violation of Fourteenth Amendment and 42 U.S.C. § 1983)

78. Plaintiffs reallege paragraphs 1 through 68 above and incorporate the same as though fully set forth here.

79. The congressional district plan adopted and being implemented by Defendants for the election of members of the United States Congress in the San Fernando Valley has no rational explanation except as an effort to separate voters on the basis of racial/ethnic origin. In drawing those lines, the reduction in Latino voting strength in what had been Congressional District 26 throughout the 1990s was the Legislature's dominant, controlling, and legally unjustified rationale.

80. The congressional district plan adopted and being implemented by Defendants for the election of members of the United States Congress in the San Fernando Valley constitutes an intentional gerrymander of the Latino population in violation of Plaintiffs' Equal Protection Rights guaranteed by the Fourteenth Amendment to the United States Constitution, in violation of 42 U.S.C. § 1983.

81. The congressional district plan adopted and being implemented by Defendants for the election of members of the United States Congress in the San Diego area has no rational explanation except as an effort to separate voters on the basis of racial/ethnic origin. In drawing those lines, the reduction in Latino voting strength in Congressional District 51 was the Legislature's dominant, controlling, and legally unjustified rationale.

82. The congressional district plan adopted and being implemented by Defendants for the election of members of the United States Congress in the San Diego area constitutes an intentional gerrymander of the Latino population in violation of Plaintiffs' Equal Protection Rights guaranteed by the Fourteenth Amendment to the United States Constitution, in violation of 42 U.S.C. § 1983.

## ATTORNEYS' FEES

83. Plaintiffs are entitled to recover reasonable attorney's fees, expenses and costs under 42 U.S.C. §§ 1973*l*(e) and 1988.

## PRAYER FOR RELIEF

84. THEREFORE, Plaintiffs pray this Court enter judgment granting to plaintiffs:

a) a declaratory judgment that Defendants' redistricting plans for congressional and State Senate districts deny plaintiffs equal opportunity to participate in the political process and elect representatives of their choice in violation of 42 U.S.C. § 1973;

b) a declaratory judgment that Defendants' redistricting plan for the election of members to Congress violates Plaintiffs' right to Equal Protection under the 14th Amendment to the United States Constitution, in violation of 42 U.S.C. § 1983;

c) preliminary and permanent injunctive relief restraining and enjoining Defendants, their officers, employees, attorneys, successors in office, and all persons in active concert and participation with them from conducting elections under the congressional and State Senate redistricting plans adopted by the State Legislature and Governor for the 2002 or any subsequent elections;

d) if state authorities fail to enact or adopt valid redistricting plans in time for the 2002 election, an order establishing new redistricting plans for congressional and state senate districts that conform to constitutional and legal standards, and that do not dilute, cancel out, or minimize the voting strength of Latino voters;

e) an award of costs, including reasonable attorneys' fees, to be paid by Defendants;

f) an order retaining jurisdiction to render any and all further orders that this Court may from time to time deem appropriate; and

g) orders granting any and all further relief to which the Plaintiffs may show themselves to be entitled or as may be just and equitable.

RESPECTFULL SUBMITTED,

Mexican American Legal Defense and Educational Fund

Counsels for Plaintiffs

By: /s/ Vibiana M. Andrade
VIBIANA M. ANDRADE

By: /s/ Steven J. Reyes
STEVEN J. REYES

DATED: November 30, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed May 7, 2002]

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Case No. 01-08477 MMM (RCx)

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MARIA CANO, *et al.*,
*Plaintiffs*,

vs.

GRAY DAVIS, *et al.*,
*Defendants*.

CALIFORNIA STATE SENATE, *et al.*,
*Intervenors*.

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THREE-JUDGE COURT

# DECLARATION OF PROFESSOR ALLAN J. LICHTMAN ON CANDIDATES OF CHOICE OF HISPANIC VOTERS IN NEW CONGRESSIONAL DISTRICT 28 IN CALIFORNIA

Date: May 13, 2002
Time: 10:00 a.m.
Dept.: Room 790

The Honorable Margaret Morrow
The Honorable Stephen Reinhardt
The Honorable Christina Snyder

# DECLARATION ON CANDIDATES OF CHOICE OF HISPANIC VOTERS IN NEW CONGRESSIONAL DISTRICT 28 IN CALIFORINA

Allan J. Lichtman, Professor
Department of History
American University
Washington, DC 20016

May 6, 2002

## INTRODUCTION

I have been asked to examine whether bloc voting by non-Hispanics within the precincts of the post-2000 Census Congressional District 28 in California is usually sufficient to defeat candidates of choice of Hispanic voters. Given my involvement over the last several months in numerous redistricting cases, I have only recently been able to turn my attention to the examination of this issue. My analysis, presented in greater detail below, shows that the results of 16 recent Hispanic v. non-Hispanic elections within the boundaries of CD 28 fail to show a usual pattern of defeat for candidates of choice of Hispanic voters. To the contrary, in most elections, Hispanic candidates of choice would have been elected within the precincts of CD 28. Thus, it cannot be concluded that there is a pattern of non-Hispanic bloc voting within CD 28 that usually is sufficient to defeat Hispanic preferred candidates.

## BACKGROUND

I am a Professor of History at American University in Washington, D.C. Formerly, I served as Chair of the History Department and Associate Dean of the College of Arts and Sciences at American University. I received my BA in History from Brandeis University in 1967 and my PhD in

History from Harvard University in 1973, with a specialty in the mathematical analysis of historical data. My areas of expertise include political history, voting analysis, and historical and quantitative methodology. A copy of my curriculum vitae, which accurately sets forth my professional qualifications and experience, is attached to this report, along with a table of cases. I am being compensated at a rate of $300 per hour.

I am the author of numerous scholarly works on quantitative methodology in social science. This scholarship includes articles in such academic journals as *Political Methodology, Journal of Interdisciplinary History,* and *Social Science History.* I have also coauthored with Dr. Laura Langbein *Ecological Inference,* a standard text on the subject of inferring the behavior of population groups from data collected for political units. In addition, I have published articles on the application of social science analysis to the Voting Rights Act. This work includes articles in such journals as *Journal of Law and Politics, La Raza Law Journal, Evaluation Review,* and *National Law Journal.*

My scholarship also includes the use of quantitative and qualitative techniques to perform political and historical studies of voting, published in such academic journals as *The Proceedings of the National Academy of Sciences, The American Historical Review,* and *The Journal of Social History.* Quantitative and historical analysis also ground my books, *Prejudice and the Old Politics: The Presidential Election of 1928, The Thirteen Keys to the Presidency* (coauthored with Ken DeCell), and *The Keys to the White House.*

I have worked as a consultant or expert witness for both plaintiffs and defendants in more than seventy federal voting rights and redistricting cases. I have been admitted as an expert witness in voting rights, political history, political systems, statistical methodology, quantitative analysis of voting, and socioeconomic analysis, among other matters, in

more than sixty federal and state court cases in which I have presented oral or written testimony. I have worked on more than a dozen cases for the United States Department of Justice and have also worked for such civil rights organizations as the Mexican-American Legal Defense and Education Fund, the Puerto-Rican Legal Defense and Education Fund the NAACP, and its Legal Defense Fund, the Lawyer's Committee for Civil Rights Under Law, the ACLU, and the Southern Poverty Law Center. I have testified on the question addressed in this report in numerous other cases including the Los Angeles redistricting case—*Garza v. County of Los Angeles*—where I served as the main expert witness on voting analysis for the U.S. Department of Justice. I have also served as an expert witness in numerous cases involving Hispanic voter opportunities in states such as Texas, Florida, New York, and Illinois.

## ANALYSIS AND RESULTS

To analyze elections results for newly drawn CD 28, PACTECH provided returns for 16 recent Hispanic versus non-Hispanic elections held within all or most the precincts of this congressional district. This data enabled me to reconstruct the results of past elections within all or most of CD 28 and thus assess the order of finish among primary and general election candidates. These elections cover the period from 1994 to 2001 for a variety of public offices and for primary, runoff, and general elections. An analyst examines various elections over a period of time in order to establish whether there exists a discernable pattern in the outcomes of elections with different individual candidacies and circumstances. This procedure is more reliable than focusing just on one or two preselected elections. The elections analyzed for this report thus provide a basis for reliable conclusions about whether there exists a pattern of non-Hispanic bloc voting in new CD 28 that usually is sufficient

to defeat Hispanic candidates of choice. The 16 primary, runoff, and general elections included in this analysis are reported in Table 1.[1]

| TABLE 1<br>HISPANIC V. NON-HISPANIC ELECTIONS<br>ANALYZED FOR PRECINCTS INCLUDED IN<br>CALIFORNIA, ENACTED DISTRICT CD 28,1994-2001 |
|---|
| |
| 1994 PRIMIARY ELECTION |
| INSURANCE COMM |
| |
| 1994 GENERAL ELECTION |
| INSURANCE COMM |
| |
| 1998 PRIMARY ELECTION |
| INSURANCE COMM |
| LT. GOVERNOR |
| SHERIFF (NON-PARTISAN) |
| STATE SENATE |
| U.S. CONGRESS |
| |
| 1998 GENERAL ELECTION |
| INSURANCE COMM |
| LT. GOVERNOR |
| SHERIFF (NON-PARTISAN) * |
| STATE SENATE ** |
| U.S. CONGRESS *** |

[1] In the 1998 Democratic primary for Attorney General there was also a relatively unsuccessful Hispanic candidate—Calderon—for whom I did not have data within CD 28. Statewide, Calderon received about 12 percent of the total vote and 24 percent of the Democratic vote in the open primary of 1998, where all candidates were on the same ballot and voters could chose among candidates of various parties. The *Los Angeles Times* Exit Poll (Study #413, California Primary Election, June 2, 1998) shows that Calderon received about 34 percent of the total Hispanic vote and about half of the Hispanic vote that was cast for the three main Democrats in the race.

| 2001 PRIMARY ELECTION (NON-PARTISAN) **** |
|---|
| LA MAYOR |
| LA CITY ATTORNEY |
| |
| 2001 RUNOFF ELECTION (NON-PARTISAN) **** |
| LA MAYOR |
| LA CITY ATTORNEY |
| * THIS WAS AN UNUSUAL ELECTION IN THAT THE NON-HISPANIC CANDIDATE IN THE RUNOFF DIED PRIOR TO THE BALLOTING FOR THE SHERIFF'S POSITION. |
| ** THE STATE SENATE DISTRICT INCLUDES MORE THAN 70 PERCENT OF REGISTERED VOTERS OF CD 28. |
| *** OLD CD 26, IN WHICH THIS ELECTION WAS CONDUCTED, INCLUDES MORE THAN 60 PERCENT OF REGISTERED VOTERS OF CD 28. |
| **** ABOUT 96 PERCENT OF CD 28 IS WITHIN LA CITY, THE REMAINDER OF THE DISTRICT COMPRISES THE CITY OF SAN FERNANDO, WHERE VOTER REGISTRATION IS MORE THAN 70 PERCENT HISPANIC. |

For 1998 primary and general elections PACTECH also provided precinct-by-precinct election returns as well as precinct-by precinct registration data, partitioned according to registrants with Hispanic and non-Hispanic surnames.[2] The information provided for the 1998 election enabled me to analyze the Hispanic and non-Hispanic vote for competing candidates, using the same statistical methods that guided my previous work as a consultant and expert witness on voter behavior, notably the ecological regression procedures for analyzing voting by race that were recognized by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and applied by the Court to single-member district plans in *Voinovich v. Quilter*, 507 U.S. 146 (1993). I likewise utilized

[2] In the *Garza* case, I likewise relied on a Spanish surname analysis of registered voters provided by PACTECH. See, Allan J. Lichtman, "Passing the Test: Ecological Regression in the Los Angeles County Case and Beyond," *Evaluation Review* (1991).

this same procedure to assess Hispanic and non-Hispanic voting in the *Garza* litigation. Analytic procedures are also discussed in the social science literature.[3]

The voting behavior of Hispanics and non-Hispanics is estimated by comparing the ethnic composition of the various voting precincts within CD 28 to the division of the vote among competing candidates in each precinct. Ecological regression, the standard method for inferring the behavior of population groups from data collected for aggregate units, was used to estimate voting and turnout. The ecological regression procedure for analyzing the behavior of voter groups is set forth in my book, *Ecological Inference* (Sage Series on Quantitative Applications in Social Science, 1978: with Laura Irwin Langbein) and analyzed, in depth, in my December 1991 article in *Evaluation Review*, which deals with the Garza case.

Similar precinct-level data was not available for the 2001 Los Angeles City elections for Mayor and City Attorney or for the 1994 primary and general elections for Insurance Commissioner. For the City elections, I relied on *Los Angeles Times* exit poll results showing that the Hispanic mayoral

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[3] See, for example, Allan J. Lichtman and J. Gerald Hebert, "A General Theory of Vote Dilution," *La Raza Law Journal* (1993); Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (Cambridge: Cambridge University Press, 1992); Allan J. Lichtman, "Passing the Test: Ecological Regression in the Los Angeles County Case and Beyond," *Evaluation Review* (1991); Bernard Grofman and Chandler Davidson, eds., *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Cambridge: Cambridge University Press, 1992); James Loewen and Bernard Grofman, "Comment: Recent Developments in Methods Used in Voting Rights Litigation," *Urban Lawyer* (1989); Richard Engstrom, "Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting," *Urban Lawyer* (1985); and Laura Irwin Langbein and Allan J. Lichtman, *Ecological Inference* (Sage Series on Quantitative Applications in the Social Sciences, 1978).

candidate Villaraigosa was the Hispanic preferred candidate and that Hispanic city attorney candidate Delgadillo was the Hispanic preferred candidate. For the two 1994 elections, the analysis assumes that the Hispanic Democratic candidate Torres was the Hispanic voters' candidate of choice—a result consistent with other Hispanic versus non-Hispanic elections analyzed for this study.

The results of analyzing 16 Hispanic v. non-Hispanic elections that entirely or substantially overlap new CD 28, as reported in Table 2, fail to show a usual pattern of defeat for Hispanic candidates of choice. To the contrary, the results show that most Hispanic candidates of choice would have advanced to a general or runoff election within the boundaries of new CD 28 and would have been elected in a general or runoff election within these boundaries. Specifically, the analysis shows that 6 of 8 primary candidates of choice of Hispanic voters would have advanced to a general election or runoff election within the boundaries of CD 28.[4] In addition, the analysis shows that 8 of 8 general or runoff election candidates of choice would have been elected in a general election or runoff election within the boundaries of CD 28. With respect to individual candidates, 6 of 8 candidates

[4] State senate candidate Alarcon in the 1998 primary election won within a more than 70 percent portion of new CD 28 that was at that time about 7 points higher in its percentage of Hispanic registrants than the entirety of CD 28. However, Alarcon prevailed by about 10 percentage points over his Democratic opponent, and projections based on ecological regression analysis and comparisons with candidates who ran district-wide show that Alarcon would have prevailed within the entirety of CD 28.

TABLE 2

RESULTS FOR HISPANIC CANDIDATES OF CHOICE IN HISPANIC V. NON-HISPANIC ELECTIONS IN PRECINCTS INCLUDED IN CALIFORNIA, ENACTED DISTRICT CD 28, 1994-2001

| ELECTIONS AND HISPANIC CANDIDATES OF CHOICE | ORDER OF FINISH IN CD 28 |
|---|---|
| | |
| 1994 PRIMARY ELECTION | |
| | |
| INSURANCE COMM | |
| TORRES (H, DEM) | 2 |
| | |
| 1994 GENERAL ELECTION | |
| | |
| INSURANCE COMM | |
| TORRES (H, DEM) | 1 |
| | |
| 1998 PRIMARY ELECTION | |
| | |
| INSURANCE COMM | |
| MARTINEZ (H, DEM) | 1 |
| | |
| LT. GOVERNOR | |
| BUSTAMANTE (H, DEM) | 1 |
| | |
| SHERIFF (NON-PARTISAN) | |
| BACA (H) | 2 (MADE GENERAL) |
| | |
| STATE SENATE | |
| | |
| ALARCON (H, DEM) | 1 |
| | |
| U.S. CONGRESS | |
| | |
| GODINEZ (H, DEM) | 2 |

TABLE 2, CONTINUED

RESULTS FOR HISPANIC CANDIDATES OF CHOICE IN HISPANIC V. NON-HISPANIC ELECTIONS IN PRECINCTS INCLUDED IN CALIFORNIA, ENACTED DISTRICT CD 28, 1994-2001

| ELECTIONS AND HISPANIC CANDIDATES OF CHOICE | ORDER OF FINISH IN CD 28 |
|---|---|
| 1998 GENERAL ELECTION | |
| | |
| INSURANCE COMM | |
| MARTINEZ (H, DEM) | 1 |
| | |
| LT. GOVERNOR | |
| BUSTAMANTE (H, DEM) | 1 |
| | |
| SHERIFF (NON-PARTISAN) | |
| | |
| BACA (H) | 1 |
| | |
| STATE SENATE | |
| | |
| ALARCON (H, DEM) | 1 |
| | |
| U.S. CONGRESS | |
| | |
| BERMAN (NH, DEM) | 1 |
| | |
| 2001 PRIMARY LA CITY (NON-PARTISAN) | |
| MAYOR | |
| VILLARAIGOSA (H) | 1 |
| | |
| CITY ATTORNEY | |
| DELGADILLO (H) | 2 (MADE RUNOFF) |

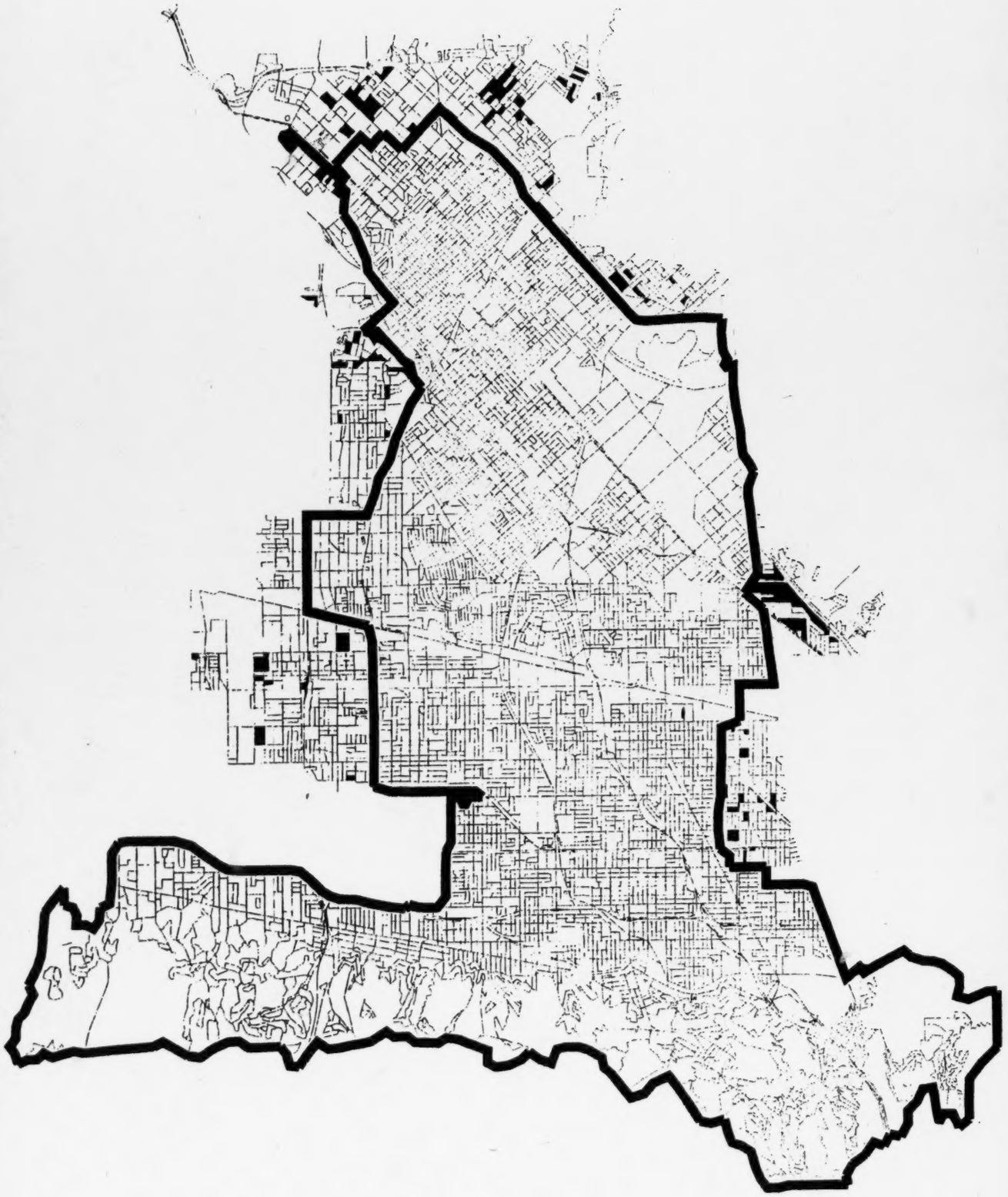
| | |
|---|---|
| 2001 RUNOFF LA CITY (NON-PARTISAN) | |
| MAYOR | |
| VILLARAIGOSA (H) | 1 |
| | |
| CITY ATTORNEY | |
| DELGADILLO (H) | 1 |

identified as Hispanic would have advanced through the primaries and been elected to public office if the election for their positions had been held within new CD 28. Thus the results of analyzing a substantial number of elections for a variety of public offices clearly show that non-Hispanic bloc voting does not usually defeat Hispanic candidates of choice within newly drawn Congressional District 28 in California.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of May 2002 in Washington, D.C.

/s/ Allan J. Lichtman
ALLAN J. LICHTMAN

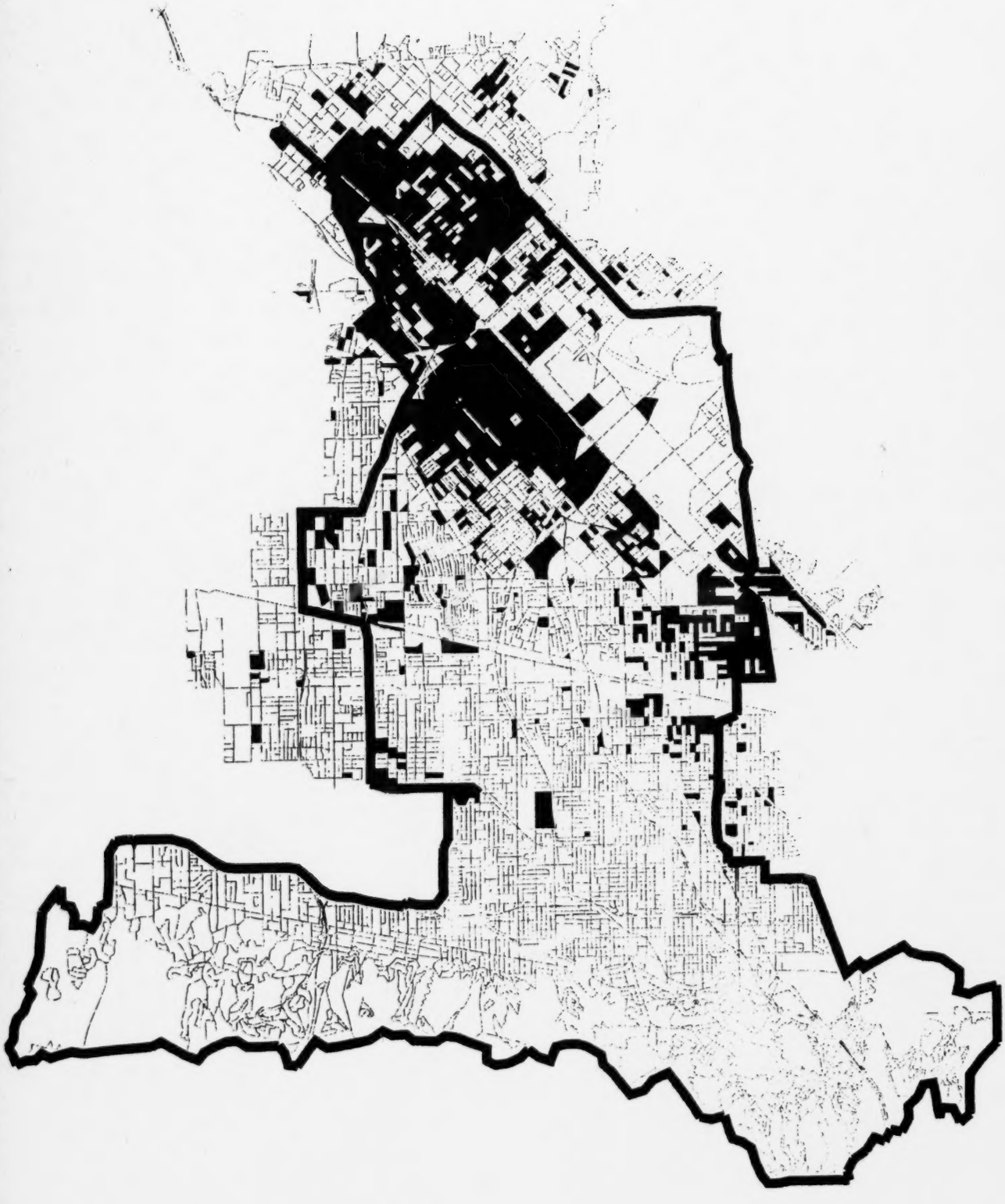
**Core Hispanic Registration Census Blocks (55% -100%) In Masters' Berman District Excluded From AB 632's CD 28**





**This map highlights in red all census blocks included in the Masters' CD 26 (Berman) with Hispanic Registration 55% or higher but excluded from AB 632's CD 28 (Berman)**

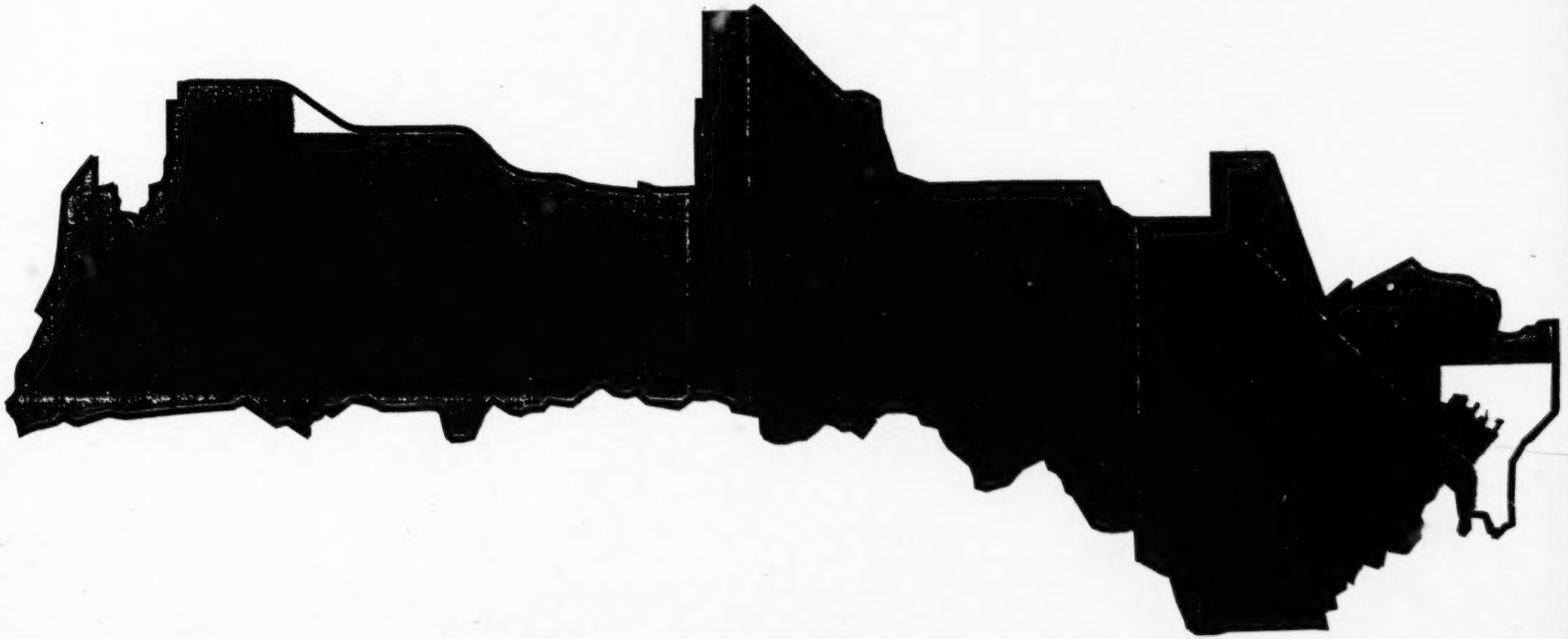
**Core Hispanic Registration Census Blocks (55%-100%) In Masters' Berman District Included In/Excluded From AB 632's CD 28**





**This map highlights in red all census blocks included in the Masters' CD 26 (Berman) with Hispanic Registration 55% or higher. The black line represents the new CD 28 (Berman) boundaries**

# 98.6% of Additions Made by AB 632 to Berman District Were Represented by Him Previously



**The area above bounded in black is the area that was added to the Masters CD 26 (Berman) to make AB 632's CD 28 (Berman) The area shaded in orange represents areas previously represented by Representative Berman.**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed May 3, 2002]

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Case No. 01-08477 MMM (RCx)
THREE-JUDGE COURT

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MARIA CANO, *et al.*
*Plaintiffs*,

vs.

GRAY DAVIS, *et al.*
*Defendants*.

CALIFORNIA STATE SENATE, *et al.*
*Intervenors*.

---

MEMORANDUM RE: DEPOSITION TESTIMONY OF ASSEMBLYMAN VARGAS IN SUPPORT OF SENATE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Date: May 13, 2002
Time: 10:00 a.m.
Dept.: Room 790

The Honorable Margaret Morrow
The Honorable Stephen Reinhardt
The Honorable Christina Snyder

In the recent deposition noticed by Plaintiffs, Assemblyman Juan Vargas provided extensive testimony that contradicted Plaintiffs' claims and that also explained his motivations, both in the Legislature and in this case. As provided for in the Court's order relating to legislative

privilege, he also opined about "the motivation of the [Legislature] as a whole." *Cano v. Davis*, 2002 WL 432057 at *1 (C.D. Cal. 2002). A copy of the full deposition transcript is attached to this memorandum as Exhibit A. Below are some excerpts:

• Plaintiffs contend that in drawing Congressional District 51 ("CD 51"), the Legislature deferred to Representative Bob Filner's alleged desire to limit Latino demographics in his district. But, as Assemblyman Vargas testified, heavily Latino Imperial County was included in the district over Representative Filner's protest, in apparent deference to MALDEF's demands:

Q. You had a lot of curiosity about CD 51—
A. Sure.
Q. —during the redistricting process, correct?
A. Yes.
Q. And you had very strong views about what ought to be in it or not?
A. Yes.
Q. And you thought that Imperial County ought to be in it.
A. Yes.
Q. And you knew that Representative Filner opposed that?
A. Yes.

(Transcript of Deposition of Juan Vargas ("Tr.") 43:14-44:7.)

• Assemblyman Vargas conceded that in CD 5l, as established by AB 632, Latinos are the dominant political force in a racially diverse community:

Q. The area that is now bounded by the CD 51 in area 632. You're familiar with that area?
A. Yes.
Q. And you described that as a racially diverse community?
A. Yes.

Q. Is there one race that you regard as being predominant in the area or one ethnic group?
A. What do you mean by predominant?
Q. In terms of population?
A. The largest number of population I believe is Latino population.
Q. What about in terms of registration?
A. What type of registration?
Q. Voter registration. Which group is most heavily present?
A. For which party?
Q. Regardless.
A. I would believe and believe it's the Latino community.
Q. And just within the Democratic party, what is the predominant ethnic group in the confines of the current CD 51?
A. I believe the Latino community. Predominant meaning, I assume, the most compared to the other groups.

(Tr. 56:3-57:3.)

• Plaintiffs' recently-withdrawn "remedial" proposal, along with Assemblyman Vargas' design for CD 51, cut large pockets of the African-American and Filipino population out of the district in as attempt to further increase Latino population figures above the level that Professor Kousser has admitted to be sufficient. While not conceding intent, Assemblyman Vargas admitted that the excision of these populations would be politically damaging to Representative Filner:

Q. Did you come to any conclusions about Representative Filner's popularity within the Filipino community?
A. Yes.
Q. What conclusion did you reach?

A. That he was well liked.
Q. Very, very popular in that district.
A. At that time?
Q. In that community, rather.
A. At that time?
Q. At that time, yes.
A. Not at that time I wouldn't say very, very popular. He became a short time after that time.
Q. And why was that?
A. He was running a bill for veterans who had fought in World War II, Filipino veterans but were Filipino citizens, not American citizens, and they did not receive benefits as American soldiers did. And he ran a bill that in fact got the president of the Philippines to come to the district, my recollection it was after that time. He may have had the bill before that, but I think the popularity came after that time.
Q. So in the fall, though, of the years 2001, you knew that Representative Filner was very, very popular in the Filipino community in San Diego.
A. I believe that he was very popular.

(Tr. 61:15-62:18.)

• On the diversity of the Latino population in San Diego, even among Democrats, Assemblyman Vargas admitted:

Q. Within the Latino community in San Diego who are Democrats, is there an uniformity of views or is there a wide variety of views?
A. I think that there is a wide variety of views.
Q. On what kinds of issues?
A. I believe on all issues. On most issues, I should say.

(Tr. 71:19-25; *see also generally* Tr. 71-76.)

• Contrary to the notion that African-Americans, "Anglos" and Asian/Pacific Islanders form a bloc that votes against Latino interests, Assemblyman Vargas testified that Latinos/African-Americans and Latinos/Filipinos are in fact "cohesive," and that there is no significant part of either group that is unwilling to vote for a Latino candidate:

Q. In the area bounded by CD 51 under the current AB 632 districts, do you believe that the African-American community and the Latino community are politically cohesive?
A. What do you mean by politically cohesive?
Q. Well, do they vote the same way?
A. On which issues?
Q. Generally.
A. More than likely, I think so, yes.
Q. The same area CD 51 under AB 632, do you think that Filipinos and Latinos tend to be cohesive politically?
A. Do you mean again do they vote on the same sorts of issues, a bond measure if it were to pass or a school measure or something like that?
Q. Uh-huh.
A. I would say that they would probably be very similar.
Q. Is it your belief that there is a significant part of the African-American population that is unwilling to vote for a Latino candidate?
A. No.
Q. And is it your view that there is any significant part of the African-American community that's unwilling to vote for a Latino candidate?
A. I believe that's the question you just asked me.

Q. I'm so sorry. Do you believe that there is any significant portion of the Filipino community that's in the bounds of the current CD 51 that is unwilling to or very reluctant to vote for a Latino candidate?
A. No.

(Tr. 76:3-77:9.)

• When asked to name areas in San Diego where non-Latino Democrats would be unwilling to vote for a Latino candidate, Assemblyman Vargas named only areas that lie *outside* CD 51:

Q. Where are the areas in CD 51 where you believe there are concentrations of non-Latino Democrats who would be unwilling to vote for a Latino because the person is Latino, the candidate's Latino?
A. A concentration?
Q. Yeah, particular areas where you see this as a more serious problem.
A. I would say that throughout the area there are groups. I don't know where the concentration would be, if there would be any concentration.
Q. But I think you mentioned that there were areas in San Diego where this would be a problem.
A. That's correct.
Q. And what are those areas?
A. But just so I'm clear, the areas that you mentioned were San Diego as a whole, not the 51st. I think that areas in the east County of San Diego, I think that those areas would be very difficult to elect a Latino. I think in the northeastern portion of the county as well. I think other areas in the northern part of the county would be very difficult.
Q. Okay. Let's find out what these areas are like.
A. Sure.
Q. North county, that's Del Mar, Carlsbad, Encinitas, that area?

A. Generally.
Q. But that area isn't in CD 5 l, right?
A. No, it's not.
Q. Then you mentioned the northeastern portion of San Diego County.
A. Yes.
Q. Can you give me some place names there?
A. Yes, I can. Escondido, Vista, Ramona, areas like that.
Q. And those are areas that are not in CD 51.
A. That is correct.
Q. Eastern part of the county you mentioned as an area where it would be very difficult for a Latino candidate to win.
A. That's correct.
Q. Those aren't areas that are included in CD 51.
A. That's correct.

(Tr. 80:23-82:15; *see also* 83:16-84:17 (unable to name areas within CD 51 in which non-Latino Democrats would not support a Latino candidate).)

• Instead, Assemblyman Vargas testified that in the San Diego area, it is the character of the candidate that matters most, rather than her ethnicity or race:

Q. Well, what you're really saying is that it's the candidate who matters more than his ethnicity or her ethnicity in elections in your old and current Assembly District.
A. I think that you're right, that it's more. That certainly the candidate matters more than only race.
Q. Sure. People are judging your politics, your character, your appeal, they're looking at a lot of things, not just at race, right?
A. People are looking at a lot of things, not only race, that's correct.

Q. In fact, race isn't district-wide the predominant factor that non-Latinos are looking at when they're making decisions about who to vote for. And now I'm just talking about the Democratic party.

A. Again, I don't understand your question. I apologize.

Q. In the Democratic party in the areas that you've been representing in the Assembly, there is no problem with people voting for Latinos, as you've proven, right? The right candidate, right qualities?

A. I think that there are areas where in fact a Latino candidate, he or she cannot get some votes because of his or her race, but I think in general you can run a race and a Latino can win.

(Tr. 85:5-86:5.)

• The Assemblyman also conceded that in his legislative role he was motivated by his own future political plans:

Q. Are you saying that in this redistricting process you never considered your own personal political fortunes? That was not part of your motivation?

A. No, that's not what I said.

Q. You did consider your own political future.

A. Yes.

Q. And you were interested in having a CD 51 that would be a good one for you to run in?

A. Not necessarily for me to run in, but certainly for a person who might want to run who would be from the community. Again, I'm not sure that I ever will run for that district again.

Q. I'm not talking about a person. I'm talking about Assemblyman Juan Vargas and your motivation. It was part of your motivation to try to get the Legislature to pass a CD 51 that would be a good one for you to run in against Filner at some time in the future?

A. My motivation was to make sure it was a good district for either myself or another person that would come from the community to have an opportunity without it being gerrymandered in a racial way.

Q. So part of your motivation had to do with your own political future.

A. I think part of my motivation, potentially my political future, because again I don't know that I will ever run for that district, at the moment don't have any plans for that. That could change.

(Tr. 106:4-107:6.)

• These political plans combined in a potent manner with the Assemblyman's acknowledged personal distaste for the "ugly" "Marxist" Representative Filner. After he expressed a personal belief in "clean" campaigns, Assemblyman Vargas acknowledged that he did not hesitate to attack Representative Filner in the strongest possible terms during the 1996 campaign:

Q. Well, you didn't have any compunction about doing that in 1996, right? You called Representative Filner a Marxist. It wasn't just sort of a nice little doily covered campaign for you. You were a hard hitter.

A. I don't recall that. I could have said it. I certainly believed that he was.

Q. A Marxist?

A. Yeah.

Q. And why do you believe he's a Marxist?

A. At that point because in fact a number of people who knew him and told me that as a young man he was a person who not only had written on Marxism, but he was a person who believed in the doctrine of it.

Q. Who were these people?

A. My campaign consultant as well as a couple of other campaign consultants in San Diego who then showed me a couple articles that were written in the "San Diego Union Tribune" early on.

Q. But you called him a Marxist in the present tense, right?

A. Yes. Well, I have to see that again, but I imagine I probably would have.

Q. And you said he was ugly?

A. In 1996, I don't believe I did.

Q. You came to the view that he's ugly later?

A. No, I always thought he was ugly.

Q. I understand the distinction.

A. I don't think I said till recently, not in the way that you suggest. I think I said an ugly—I think the quote you're probably looking at I think he's something like a selfish and ugly person. I didn't mean physically ugly.

Q. You have used the word ugly repeatedly?

A. I don't know about repeatedly.

* * * *

Q. That's clean campaigning or defending yourself?

A. I think that's defending yourself.

(Tr. 119:8-120:21.)

• Assemblyman Vargas also gave vivid testimony about the force of his hatred for Representative Filner:

Q. You're defending that he's ugly and the most selfish person you know. Is there anybody in the world that you hate as much as Representative Filner?

A. I hate a lot of people, I think, as much as I hate Bob.

Q. Any people in politics that you hate as much as Bob?

A. Yes.

Q. Who is that?

A. People who were involved in the Central American War.

Q. On which side of that war?

A. Certainly on all sides. The United States, people who were sending weapons to fight down there, people on the military side of El Salvador, people on the military side of Nicaragua, people involved in all the carnage that went on there. I believe that all those people, you know, had just a disastrous effect on people's lives that was horrible.

Q. Including the Americans who sent weapons to those wars.

A. Yes.

Q. Particularly people in the political administrations?

A. Yes.

Q. The Reagan administration?

A. The Reagan administration.

Q. So other than the Reagan administration and mass murderers in Central America, is there anybody in politics other than those who you hate as much as Bob Filner?

A. Yes, absolutely. A woman named Barbara Warden who I used to work with and unfortunately had a real falling out with. Certainly dislike her as much as I dislike Bob Filner. I think that I would have to say there's a few other people I'm learning to dislike very much as I'm up here.

(Tr. 121:22-122:7.)

• The Assemblyman underlined what has been obvious since the beginning of this case—that his personal ambitions and personal hatreds played a central role in his legislative acts, and continue to play a role in his participation in this case:

Q. Certainly, you'd relish any opportunity that you would have to stick it to Bob Filner given how much you hate him.

A. I don't know that I would classify it as that. I certainly wouldn't be upset if anything I did was detrimental to his political campaign, but, again, only his political campaign. Not anything else.

Q. Sure. I mean like removing his district that has supported him most heavily. That would be pretty attractive.

A. Yes, I believe so.

(Tr. 122:14-123:6.)

• Finally, Assemblyman Vargas dissented from Plaintiffs' continuing "intent" allegations ascribing discriminatory intent to the State's two legislative bodies. He was asked his opinion of the motivation of the Legislature as a whole:

Q. And is it your opinion that the Legislature voted as a whole to discriminate against Latinos in adopting this redistricting plan?

A. No.

(Tr. 132:14-17.)

Dated: May 3, 2002

Respectfully submitted,

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Supreme Court U.S.
FILED
DEC 13 2002
OFFICE OF THE CLERK

No. 02-577

In The
# Supreme Court of the United States

MARIA CANO, ET AL.,

*Appellants,*

v.

GRAY DAVIS, ET AL.,

*Appellees.*

**On Appeal From The United States District Court For The Central District Of California**

## APPELLANTS' OPPOSITION TO MOTION TO AFFIRM OR DISMISS

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## ARGUMENT

By describing at length Latino electoral success in California, the participation of Latino officeholders in the redistricting process, and the district court's determinations regarding dilutive "effects" as defined in *Thornburg v. Gingles*, 478 U.S. 30 (1986) Senate Appellees' Motion to Affirm or Dismiss overly complicates and obscures what is a straightforward issue raised in this appeal: is intentionally limiting the electoral power of a racial group legally proscribed even when the targeted group maintains substantial political power, which it achieved in part through candidates successfully appealing to members of other racial groups? Or, stated differently and in a more reduced fashion, does a racial group's power and cross-group appeal ever render intentional discrimination against the group permissible? Informed by this Court's longstanding and more recent precedent, the answer seems plain. Intentional, race-based harm to a group is never permissible under our laws.

Plaintiffs produced evidence of intent that showed far more than mere consciousness of race on the part of the map drawers. Indeed, while Senate appellees introduced testimony and argument that attempted to place a more benign countenance on the California legislature's racial intent,[1] plaintiffs presented substantial direct and circumstantial evidence of more insidious motive. At the

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[1] Of course, even if true, the purported benevolent splitting of the Latino community to ensure that both Democratic incumbent Congress members (each now conveniently unthreatened by any bloc of Latino Democratic voters who might unite behind a primary challenger) would learn to serve Latinos cannot excuse prohibited racial intent. *See* Juris. Statement at 10-11 & n. 7.

summary judgment stage, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Applying that standard here, the evidence showed that, in drawing the congressional districts in question, defendants split the Latino community and restricted its voting strength because they viewed that community as a political monolith whose continued unification – the Latino neighborhoods involved had been united in the same district over the previous decade – would threaten even three quite-popular Democratic incumbents with potentially successful nomination challenge.[2] In other words, defendants sought to protect incumbents from challenge not by a particular person or political party, but by *anyone* who came from and had the support of the *Latino* community. That is the quintessence of intentional racial vote dilution.

Yet, while the district court formally applied the proper summary judgment standard – assuming that plaintiffs could prove intentional dilution – it nonetheless held that such a quintessentially dilutive motive was acceptable and lawful because California Latino candidates have historically garnered some white votes and, in part because of that crossover appeal, have attained

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[2] Plaintiffs' evidence showed that defendants adopted something very much like Dr. Morgan Kousser's "40% rule," which Senate appellees now characterize as odd and unprecedented. *See* Mot. to Affirm at 6. While they might not have catalogued empirical evidence as Dr. Kousser did, the state's map drawers acted on their conclusion, informed by experience, that Latino voting strength above a certain level in the Democratic Party would threaten incumbents because Latinos could control the outcome of the primary election.

significant, albeit far from controlling, political power. In essence, the district court concluded that the very palpable "effect" that the map drawers themselves perceived – that the Latino community's ability to elect a candidate of choice through a primary challenge would be diminished if the community were split – and that Senate appellees now admit to be "impeccable as a matter of logic," Mot. to Affirm at 23,[3] is insufficient to permit a challenge to intentional dilution. In virtually any other context, this impeccably logical (and very real) effect would suffice to open a wrong – such as intentional racial vote dilution – to court challenge, yet the district court held that effect insufficient in the voting rights context. Instead, the court applied a much higher "effect" standard, one of no cross-over voting and near total exclusion from political power.

Thus, this appeal squarely presents a puzzle that this Court alone can solve – whether voting rights, unique among all other areas, is an area where federal constitutional and statutory law permits even the most malicious and self-serving racial discrimination so long as the target has attained some amount of political power. The fair extension of this Court's jurisprudence seems to suggest strongly that voting, a right so foundational and so preservative of all others, is not such a free zone for racial animus, yet three seasoned federal judges and the largest state in the union believe that it is. Dismissal or summary affirmance are not appropriate with such a substantial question at stake.

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[3] Senate appellees' acknowledgment of this effect exposes their characterization of plaintiffs' claim as one of "intent with no effects," *see* Mot. to Affirm at 23, as so much rhetorical hyperbole.

## I. Intentional Vote Dilution Claims Need Not Satisfy Any Heightened Standard of "Effects."

Plaintiffs who can prove intent, under standards initially set forth in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), must show an effect of the intentional discrimination; however, that effect need not rise to the "effects" showing required to prove a violation in the absence of evidence of intent. As a matter of logic, when a plaintiff cannot demonstrate intent through direct and strong circumstantial evidence, but proceeds to show only effects as leading to an inference of intent, the level of "effects" required should necessarily be higher. Otherwise, intent evidence becomes utterly superfluous, a result wholly incongruous with the constitutional imperative of rooting out *intentional* discrimination.

Contrary to Senate appellees' assertion, none of this Court's precedent establishes any rule contrary to this logic. Indeed, the racial discrimination precedents appellees cite, *see* Mot. to Affirm at 21, are consistent with this logical principle. Two of these cases, *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and *White v. Regester*, 412 U.S. 755 (1973), were decided before this Court held, in *Washington v. Davis*, 426 U.S. 229 (1976), that the constitution requires proof of intentional discrimination, so the two cases necessarily involved a heightened requirement of "effects" – to demonstrate not merely standing to seek a court remedy, but a constitutional violation as well.[4] In *City of*

[4] Indeed, in *Whitcomb*, this Court noted that there was "no suggestion here that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial . . . discrimination." 403 U.S. at 149.

*Mobile v. Bolden*, 446 U.S. 55 (1980), also cited by appellees, this Court concluded that the Voting Rights Act required proof of intent; there was no decision that plaintiffs must also meet some heightened "effects" standard when they present substantial direct and circumstantial evidence of intent. Indeed, the Court compared the required showing of intent to that required in *Washington v. Davis* and *Arlington Heights*. *See* 446 U.S. at 66-67. Finally, in *Rogers v. Lodge*, 458 U.S. 613 (1982), the discussion of effects cited by appellees also arises in the context of an attempt to prove intent in the absence of direct evidence of it. *See id.* at 624 (reliance on effects and "supporting proof" to "support an inference of intentional discrimination."). Thus, none of these cases involves direct and substantial proof of an intent to dilute minority voting power.

That, then, leaves appellees in near-exclusive reliance on one stray statement in *Davis v. Bandemer*, 478 U.S. 109 (1986), a case involving political gerrymandering and not racial gerrymandering. This reliance belies a failure to appreciate the constitutionally unique status of intentional *racial* discrimination. Unlike race or ethnicity, political affiliation is not a suspect classification subject to strict scrutiny. Indeed, in *Davis* itself, the court acknowledged this difference in noting that the political gerrymandering plaintiffs faced a more difficult burden: "the elements necessary to a successful vote dilution claim may be more difficult to prove in relation to a claim by a political group." *See id.* at 131 n. 12.

Intentional racial discrimination must be accompanied by some real effect to be actionable, but that showing of effect need not rise to showing of near total exclusion

from the political process. Nothing in this Court's precedent dictates such a difficult standard.

## II. Voting Rights Is Not a Constitutional Outlier in the Area of Racial Discrimination.

Senate appellees fault plaintiffs for discussing racial discrimination precedent from outside the redistricting context. *See* Mot. to Affirm at 24. Based on this critique, appellees simply ignore what these cases from other contexts say and mean. This extraordinary attempt at hyper-atomized analysis implies an otherwise coherent constitutional vision as to intentional racial discrimination, with the singular exception of redistricting. Even if such exceptionalism had a place in constitutional interpretation, it would be bizarre to apply a more lenient stance toward intentional discrimination in the area of voting rights. The primacy of these rights, so preservative of all other rights in our democratic system, is well-established.

Yet, that is precisely the kind of exception the district court endorsed in its decision and appellees urge in their motion. The Court's more recent and historical discussions of the extreme constitutional disfavor of intentional discrimination, even when such discrimination targets the majority group with controlling political power, reflect a doctrine directly at odds with the lower court judgment here, that intentional discrimination was lawful because Latinos have gained significant political power – perhaps even rising to proportional, depending on what subset of the total population serves as denominator – in California. *See generally* Juris. Statement at 17-23.

If the Constitution and federal civil rights laws intend that intentional racial discrimination in the area of voting rights be treated differently,[5] this Court should explain the contours of that exceptionalism to guide future decision-makers. If that is not the meaning of our law, then the district court decision must be reversed. In either event, this is not a case where summary affirmance would serve its appropriate purpose.

## III. The Constitutional Wrong of Racial Classification of Voters Can Appear in Dispersion As Well As Segregation.

Senate appellees essentially re-assert the district court's conclusion that plaintiffs cannot pursue a claim under *Shaw v. Reno*, 509 U.S. 630 (1993), because plaintiffs object to the "cracking" of a minority community rather than to the "packing" of it. It is true that, to date, the cases decided by this Court under the *Shaw* doctrine have involved "packed" districts in which one racial group predominates, and it is the intentional concentration of a group of voters that plaintiffs in these cases have challenged. However, this Court has identified the underlying constitutional wrong as the classification of voters on the basis of race. *See, e.g., id.* at 657 ("Racial classifications with respect to voting carry particular dangers."); *Miller v.*

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[5] Of course, it is true that, in recognition of the need to take into account communities of interest, *awareness* of race is permitted greater scope in redistricting than in other areas; however, as plaintiffs explain in the Jurisdictional Statement and above, here the evidence was of actual intent to dilute a racial group's power rather than simple race-consciousness.

*Johnson*, 515 U.S. 900, 911-12 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race," think and vote alike.). This wrong can occur when voters of a particular group are separated between districts just as much as when they are concentrated in a district.[6]

Thus, this Court's expressed disfavor for the racial classification of voters can apply regardless of whether a district is racially segregated or not. Segregation per se is not a constitutional wrong; it is racial classification, coupled with predominant reliance on that classification in crafting districts, that offends the Constitution. While this often appears in the form of racially segregated districts, it can also occur, as here, when a racial group is split, having been united for the previous ten years, and the predominant concern in making the split is race. Summarily affirming the district court decision here will send the incorrect message that it is segregation alone that is the constitutional wrong.

## IV. Predominant Reliance on Separation of Racial Group Deviates Per Se From Traditional Criteria.

In arguing that there was no evidence that the state failed to follow traditional redistricting criteria, Senate appellees, like the district court, ignore the evidence of

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[6] Indeed, "packing" and "cracking" are often mirror images; concentrating one group often means splitting another group between districts.

intentional racial discrimination, which the court was obliged to credit at summary judgment. Intentional "cracking" of a racial group is not a traditional redistricting criterion; thus, such "cracking" is of course a departure from acceptable tradition. And, while this Court has identified departures from traditional criteria as tending to prove intentional racial classification of voters, that does not mean that intentional classification must involve abandonment of such criteria as contiguity, equipopulousness, or minimal city splits.[7] *See* J.S. App. at 20-22 (district court discussion of traditional criteria). Even if lots of smoke usually indicates fire, that does not mean that every fire has lots of smoke. Sometimes fire can be detected by heat or simply by observing the flames.

Here, trenchant evidence of intentional discrimination demonstrated unlawful classification of voters on the basis of race.[8] No demonstration of contiguity, a now ubiquitous characteristic of districts in the modern age; equal-sized districts, a separate and basic constitutional mandate; or fewer city splits, a tepid indicator of traditional redistricting practice, could possibly overcome this evidence. Like the proverbial silk purse from a sow's ear, adherence to these criteria – wholly unremarkable when present, even if extraordinary when absent – cannot convert intentional

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[7] It seems incongruous to rely on minimal city splits as evidence of adherence to traditional criteria, *see* Mot. to Affirm at 19, when the congressional districts involved in this appeal lie within two large cities, Los Angeles and San Diego, which must be split in order to satisfy the constitutional one-person, one-vote standard.

[8] Plainly, in order to discriminate on the basis of race, one must first classify and distinguish on that basis.

racial discrimination itself into what it is not, an ordinary and acceptable characteristic of district-drawing.

## CONCLUSION

The district court properly assumed based on strong evidence – as it was required to do at summary judgment – that plaintiffs could demonstrate an intent to dilute the Latino vote. Yet, despite this conclusion, the court held that plaintiffs could not prevail under either a vote dilution or *Shaw* theory. This conclusion immunizes intentional racial discrimination despite an anticipated and real effect on the rights of Latino voters. Such an immunity is unprecedented. Summary affirmance or dismissal of the appeal is inappropriate.

Respectfully submitted,

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